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CURRENT TOPICS.

The case of Evans v. St. Louis, etc. R. Co., recently decided by the St. Louis Court of Appeals, is on all fours with the decision of the New York Court of Appeals in Auerbach v. New York, etc. R. Co., mentioned in our issue of last week. The facts are almost exactly similar. Plaintiff had a ticket, upon the face of which it was expressed that it should expire if not used before the expiration of a certain day—February 26, 1881. He entered the car of defendant at 9 P. M. on that day, and, before midnight, upon being called upon by the conductor, produced his ticket, and was told that he could not ride beyond Bismark upon it, and was put off at a way station eighty miles from St. Louis, and a much greater distance from the point of his destination. He was put off between 12 and 2 o'clock in the morning, in very inclement weather, and, in consequence of the weather and the darkness, was seriously injured by a fall and illness. There was a verdict and judgment for the plaintiff for $250. Upon appeal this judgment was affirmed. A very able and lucid opinion was rendered by THOMPSON, J., in which occurs the following language:

"We are of opinion that such a ticket is 'used' when the holder of it enters upon the transit for which it calls, at any time before the midnight of the last day to which it is limited. Certainly the terms employed in the ticket are not so plain as to leave no room for construction; and in a case of this kind, where there is room for construction, there is no principle upon which we can be asked to adopt a strict construction as against the traveling public. The railroad company have sold this ticket and have got their money. It is not suggested that any hardship or injustice would accrue to them from the adoption of the construction which the plaintiff asks to put upon its language. The contrary construction in this instance, ta least, operates as a forfeiture; and it is certainly a good rule, in construing a doubtful clause, in a contract relating to time, within which a given thing is to be done, so to construe the contract as to save a right and prevent a forfeiture."

The tide of adjudications seems to be gradually turning against the doctrine that a telegraphic company may relieve itself of liability for mistakes in the transmission of messages, by stipulating in illegibly small type upon the heading of the blanks for messages that it will be liable only for such messages as are "repeated" beyond the amount paid for the transmission of the message. Although there has been a substantial conflict of authority upon this subject (See 14 Cent. L. J. 386), the doctrine of two very recent cases is decidedly against the view contended for by the telegraphic companies. One of these is Western Union Tel. Co. v. Blanchard (Ga.), reported in these columns (14 Cent. L. J. 331), and the other is White v. Western Union Tel. Co., decided recently by the United States Circuit Court at Leavenworth, Kansas, which, both in the facts out of which the controversy arose, and in the conclusion reached, was very similar to the Georgia case. The plaintiffs, who were merchants in Atchison, delivered to the agent of the defendant at that point for transmission to merchants in St. Louis, the following message: "Sell 15 July wheat; sell rye 52 or more." When the dispatch was received by the party to whom it was transmitted it read fifty instead of fifteen, and, in consequence, the St. Louis merchants sold 50,000 bushels of July wheat, instead of 15,000 as instructed, and hence resulted the damage complained of. The charge to the jury, after stating these facts, proceeds: "The paper upon which the dispatch is written is a form furnished by the telegraph company, limiting and restricting their responsibility in the transmission of dispatches, and this, in substance, forms the contract upon which this dispatch was transmitted. There are some things, however, sought for in this contract to relieve the defendant from liability, which the law will not admit, and that is that they can not be released from damages by culpable negligence of their employees. If the mistake arose from the culpable negligence or gross neglect of the employees, then the

company is responsible, because the law imposes upon the company some degree of care and diligence upon the part of its employees to transmit messages safely and properly. The burden of the proof rests upon the plaintiff to show that the error or mistake occurred through the gross negligence of the employee of the defendant." The jury returned a verdict for plaintiff.

CONTRACTS OF CARRIERS OF GOODS.

The liability of carriers of goods so frequently comes into question both in the superior and inferior courts, that, although we have dealt with the subject on some previous occasions, it is desirable to keep our readers *en courant* with the latest decisions, embracing two Irish and two English cases, and one Canadian case.

In M'Indoe v. M. G. W. (of Ir.) R. Co.,[1] we find it held by May, C. J., on a civil bill appeal, that a railway company, carrying live animals, are not insurers thereof, and, in the absence of any evidence of negligence or proof of the cause of the injury to the animals, will not be liable to damages for such injury—a useful affirmance of a rather important principle, which would seem to be sustained by Blower v. G. W. R. Co.,[2] and Kendall v. L. & S. W. R. Co.;[3] * * * but in most of the States such carriers are held to be common carriers, and to be insurers to the same extent as if engaged in carrying general merchandise, subject to exemption in respect of damage caused by the animals to themselves and to each other.[4] Not content, however, with this limitation to their liability—a question only debated in modern times, for the transportation of living animals was unknown to the era of the formation of the common law—such carriers habitually endeavor to diminish their liability by special contracts, perhaps too readily entered into by consignors, who trust, in case of loss, to the ingenuity of counsel to show in some way or other that the conditions imposed are not just or reasonable. Moore v. Great Northern Ry. Co., decided by the Queen's Bench Division in March last, was a case of this kind, as observed by Fitzgerald, J., and should next be noticed.

There it appeared that the plaintiff delivered a horse to the defendant company, for carriage under a special contract, containing a condition that, in case of animals for which a contract note with two rates of carriage should be offered to the customer, the defendants would give him the alternative of carrying at either rate; that at the full rate, which would be charged when the contrary was not expressed, the defendants would undertake the ordinary duties of carriers, subject to the conditions in the said contract note and their statutory rights; but, that at the reduced rate the defendants would carry "at owner's risk," exempt from all liability not occasioned by the wilful misconduct of the servants acting within the scope of their authority; while by a further condition they were to be exempted "in all cases from liability for injuries caused by fear or restiveness of animals." The plaintiff elected to have the horse carried at the lower rate, and the horse having been injured in consequence of a platform having been rendered unfit for the transit of the horse along it, by reason of its being crowded at the time with goods, the action was brought to recover damages for negligence. At the trial, May, C. J., held that the last quoted condition was unreasonable, and, as it formed an integral portion of the alternative offered to the plaintiff, he determined that the whole was inoperative. On a new trial motion, Fitzgerald, J., said: "If the true interpretation of that provision is, that it embraces every case in which injury immediately flowed from the fear or restiveness of the animal, although the state of fear or restiveness was directly caused by some act of negligence, or want of care on the part of the defendants, we should be inclined to adopt the view of the Lord Chief Justice; for it would seem not just or reasonable to say we accept at the higher rate the risks of carriers for hire, but we limit that liability by excepting from it losses arising in certain cases from our own neglect or default. *E. gr.*: a collision occurs, arising from the misconduct or negligence of the defendants, not directly occasioning injury to the animal

[1] 16 Ir. L. T. Rep.
[2] L. R. 7 C. P. 655.
[3] L. R. 7 Ex. 373.
[4] See 4 So. L. Rev. 464.

but creating a condition of 'fear,' excited by which the animal injures itself. If the term in question was to protect the defendants from liability as carriers at the higher rate for hire, we should be inclined to come to the conclusion that an alternative embracing such a condition was unreasonable." In the opinion of the court, however, the provision in question should not be construed in a sense so large, but covered only "all cases in which the injury arises from the fear or restiveness created by transit in (*sic*) its ordinary accompaniments, and without any negligence or default on the part of the defendants; such, for instance, as contiguity to the engine, noise of the engine, or whistle, shunting, passing trains, etc. Taken in that limited sense, we are of opinion that the condition was not unreasonable. The case of Gill v. Manchester R. Co.,[5] decided in 1873, seems to bear out this view of the construction of the condition." * * * * As regards the particular negligence in question in Moore's case, we think Rooth v. N. E. R. Co.,[6] more in point than any of the cases that were cited.[7]

There, the plaintiffs (respondents) sued the defendants (appellants) for breach of contract to carry a quantity of petroleum in covered cars from London (Can.) to Halifax, alleging that they so negligently carried the same upon open platform cars, whereby the barrels in which the oil was, were exposed to the sun and weather and were destroyed. At the trial a verbal contract between the plaintiffs and the defendants' agent at London was proved, whereby the defendants agreed to carry the oil of the plaintiffs in covered cars with quick despatch. The oil was forwarded in open cars, and delayed at different places on the journey, and in consequence of which a large quantity was lost. On the delivery of the oil the plaintiffs signed a receipt note, which said nothing about covered cars, and which stated that the goods were subject to conditions indorsed thereon, amongst which were—viz.: "That the defendants would not be liable for leakage or delays, and that oil was carried at owners' risk." It was held by Sir W. J. Ritchie, C. J., and Fournier and Henry, JJ., that the loss did not result from any risks by the contract imposed on the owners, but that the loss arose from the wrongful act of the defendants in placing these goods on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers. While Strong, Fournier, Henry and Gwynne, JJ., were of opinion—affirming the judgment of the Court of Common Pleas—that the verbal evidence was admissible to prove a contract to carry in covered cars, which contract the agent at London was authorized to enter into, and which must be incorporated with the writing, so as to make the whole contract one for carriage in covered cars, and therefore defendants were liable.

Another condition in Moore v. Great Northern R. Co., was that no claims in respect of "goods" would be allowed unless made within three days after delivery. This it was also contended was unreasonable; but no cases on the subject seem to have been referred to in argument. "We incline to think," said Fitzgerald, J., "that this condition applies to inanimate goods and not to cattle, and that it is not unreasonable; and, further, we desire to point out that the conditions which the court or judge is to determine to be just and reasonable under the statute are, 'with respect to the receiving, forwarding and delivering of animals, goods or things.' The eighth condition relates to something to occur after delivery." We may add that in Simons v. Great Western R. Co.,[8] a condition was held reasonable that "no claim for deficiency, damage or detention shall be allowed unless made within three days after delivery of the goods, nor for loss, unless made within seven days after the time when they should have been delivered." [9] In the United States the weight of authority appears, on the whole, to preponderate in favor of sustaining regulations relating to the time and manner of presenting claims for dam-

[5] L. R. 8 Q. B. 186.

[6] L. R. 2 Ex. 173; 36 L. J. Ex. 83.

[7] And See Rhodes v. Louisville R. Co., 9 Bush. 688; Hawkins v. Great Western R. Co., 17 Mich. 57; 18 Ib. 427. The case of Grand Trunk R. Co. of Canada v. Fitzgerald, 13 Can. L. J. 266; 1 Can. L. T. 449, decided by the Supreme Court, Ontario (June, 1881), touches the same question, and may here be mentioned.

[8] 18 C. B. 805; 26 L. J. C. P. 25.

[9] And so in Lewis v. Great Western R. Co., 5 H. & N. 867, 29 L. J. Ex. 425. But see *per* Cockburn, C.J., Garton v. Bristol, etc. R. Co., 1 B. & S. 112.

ages; but in all, or nearly all, the cases, the time limited was about thirty days.[10] A stipulation, in a contract of shipment of live animals, that no claim for loss or damage will be allowed unless made "before or at the time the stock is unloaded" (not to be deemed to the identical moment), was held reasonable in Goggin v. Kansas, etc. R. Co.,[11] and see Rice v. Kansas, etc. R. Co,[12] and Oxley v. St. Louis, etc. R. Co.,[13] where, in reference to a provision that the claim for damages should be made to the general freight agent in writing "within three days" from the time the stock was unloaded, the court said, "we are not prepared to say that the failure of the plaintiff to make this claim in the manner and within the time specified would, on that account alone, deprive him of his right of action." Non-delivery of the goods themselves was held not to be "loss" or "damage" within the meaning of such clauses in Porter v. Southern Express Co.[14] A condition in a bill of lading that all claims for damages should be made before the article was taken away from the station was held to be reasonable, except as to latent defects, in Capehart v. Seaboard, etc. R. Co.,[15] but in a subsequent case of the same name,[16] a precisely similar provision was held, by the same court, to be unreasonable.

Again, it was conditioned, in Moore's Case, that all goods were received subject to the company's "general lien," both for carriage thereof and all other charges against the customer; and this was argued to be unreasonable, as giving them a general instead of only a particular lien confined to the freight and charges on each particular parcel of goods. "We do not," said Fitzgerald, J., "interpret the ninth condition in that light, nor do we think it unfair, or a condition coming within the statute." The common law right is a specific lien;[17] and the right to a general lien can only be supported by proof of general usage, special agreement, or mode of dealing, supporting such a claim.[18] Gordon v. Great Western R. Co.,[19] which seems not to have been cited in Moore's Case, arose out of a detention of goods on the ground that the company had a lien which did not in fact exist, and may next be noticed.

There, it appeared that the plaintiff delivered to the defendants at W some cattle to be carried to G, and there delivered to his agents. The cattle were consigned, and the carriage prepaid, at a reduced rate known as "owners' risk rate," to which it was a condition that the defendants should "not be liable in respect of loss or detention of, or injury to, the said animals or any of them, in the receiving, forwarding, and delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the company or its servants." On arrival at G the cattle were unloaded and placed in cattle pens by the defendants' servants; but, in consequence of the clerk at W having negligently omitted to enter the cattle on the consignment note as "carriage paid" the defendants refused to deliver them to the plaintiff until two days afterwards, alleging that the carriage had not been paid, and claiming a lien accordingly. Without actually deciding whether, under such circumstances, there was evidence of "wilful misconduct,"[20] it was held that the defendants were liable, as the "detention" contemplated in the condition did not cover the case of an unjustifiable refusal to deliver at the proper time on arrival. "If it included a case like the present," said Grove, J., "the company would virtually be protected from loss however occasioned, and the condition would be highly unreasonable." There was no casual detention, no detention occasioned by some act on the part of the company's servants which had delayed the transit or delivery of the cattle,

[10] The following may be consulted in support of the reasonableness of such conditions: United States Express Co. v. Harris, 51 Ind. 127; Weir v. Express Co., 5 Phila. 355; Express Co. v. Caldwell, 21 Wall. 264; Southern Express Co. v. Hunnicutt, 54 Miss. 566. But, on the other hand, see Capehart v. Seaboard, etc. R. Co., 81 N. C. 438; Adams Express Co. v. Reagan, 29 Ind. 21; Southern Express Co. v. Caperton, 44 Ala. 101; Place v. Union Express Co., 2 Hilt. 19.

[11] 12 Kas., 416.

[12] 63 Mo., 314.

[13] 65 Ib., 629.

[14] 4 S. C., 135.

[15] 77 N. C., 355.

[16] 81 N. C., 438.

[17] Butler v. Woolcott, 2 B. & P. 64.

[18] Rushforth v. Hadfield, 6 East. 519; Wright v. Snell, 5 B. & Ald. 350; and see Wiltshire Iron Co. v. Great Western R. Co., L. R. 6 Q. B. 776.

[19] 8 Q. B. D. 44; 51 L. J. Q. B. 58; 45 L. T. (N. S.) 509.

[20] See Goldsmith v. Great Eastern R. Co., 44 L. T. (N. S.) 181, commented on in 15 Ir. L. T. 382, which case was not cited.

but an intentional detention of the cattle for reasons entirely without foundation, and not in the course of "delivery thereof." [21]

Brown v. Manchester, etc. R. Co.,[22] the last of the recent cases to be here noticed, also arose in consequence of delay in delivery. The plaintiff had signed a "risk note," by which the defendants were to be free "from all liability for loss or damage by delay in transit, or from whatever other cause arising," in consideration of which the defendants agreed that the rates charged were to be "one-fifth lower than where no such undertaking is granted," freeing them from their liability as common carriers. Was this a just and reasonable condition? "Whether it is so," said Cave, J., "must depend upon what the sender gets in exchange for the liability of the company that he gives up. If, for instance, there was only one rate, and a condition that the company was not answerable at all, I should hold that it was unjust and unreasonable; but, that is not this case. Here they offered a reduction of one-fifth the ordinary rate to free the company from liability." And accordingly, as the plaintiff had an alternative open to him under which the defendants would have undertaken the carriage, at the ordinary rate, subject to all the liability of common carriers, it was held that the condition, which the sender had accepted for his own convenience and advantage, was reasonable. He "knew what the ordinary rates were," it is to be observed, as Mathew, J., remarked; but, as he mentioned, a "difficulty" had presented itself at the outset, "that the evidence did not disclose what the other rates referred to were," which, however, was removed by an admission of the counsel. And this brings us back to Moore v. Great Northern R. Co., as to which we have to mention, in conclusion, that, it having been urged that the two alternative rates should appear in figures on the face of the contract note, whereas only the lower rate was specified, Fitzgerald, J., said: "We see no ground for this contention, and observe that the conditions refer to the company's tariff, in which all the rates to and from each particular station are specified, and which we have no doubt were well known to the plaintiff." Perhaps this is not too violent a presumption, as the plaintiff was a "professional owner of horses" (*sic*), and it was not the first time he had signed such contracts; but, we can not help thinking that it would have been more satisfactory if the court had some more decisive grounds for imputing knowledge to the plaintiff, as well of its extent and nature, especially if the English decision of Bradbury v. Great Northern R. Co.,[23] be correct, that, had the full parliamentary toll been in fact exacted under the *quasi* lower rate, also, such conditions would offer no *bona fide* alternative.[24]—*Irish Law Times.*

[21] See, further, as to delay in delivery, and warehousing of goods, 14 Ir. L. T. 245, 255; Bryant v. Southwestern R. Co., 66 Ga.

[22] 46 L. T. (N. S.) 389.

[23] Reported alone in 10 Ir. L. T. 123.

[24] And see Gallagher v. Great Western R. Co., 8 Ir. L. T. Dig. 26.

STATUTORY PROVISIONS FOR LEASING RAILROAD.

Railroad corporations derive their power to lease other lines of road from the legislature. [1] Contracts of lease made by such corporations without legislative authority therefor, have been held *ultra vires* both in England and this country.[2] But a railway company leasing its road, even by consent of the legislature, does not thereby escape responsibility. [3] The lessee, however, is primarily liable for all injuries committed by its road. [4] Nor can the lessee defend in such cases on the ground that their lease is void. [5] For the lessee is in general bound by all the prohibitions and limitations contained in the charter of the lessor company.[6] But it is not, of course, liable for injuries committed prior to the lease.[7] The lessor, however, is not responsible for the torts of the lessee company.[8] Yet it will be liable if it contin-

[1] Redfield on Railways (5th ed.), p. 616, ch. 22.

[2] Id.

[3] Id.; Pierce on Railroads, 283; Thompson on Negligence, 509, *seq.*

[4] Baxter v. Wheeler, 49 N. H. 9.

[5] McClure v. Manchester, etc. R. Co., 13 Gray, 124.

[6] Pennsylvania R. Co. v. Sly, 65 Pa. St. 205.

[7] Pittsburg, etc. R. Co. v. Kain, 35 Ind. 291.

[8] Mahoney v. Atlantic, etc. R. Co., 63 Me. 68; Ditchert v. Spuyten Duyvil, etc. R. Co., 67 N. Y. 425.

ues, notwithstanding the lease, to operate the road, [9] or allows it to be operated in its corporate name.[10] The statutes are held generally to impose the duty to fence, and the liability for injuries caused by the want of the required fence upon any companies or persons operating the road, although not owning it as lessees. [11]

In Iowa, when two railroad companies operate trains on the same road, one being the owner and the other a lessee, each is liable only for stock injured or killed by its trains by reason of the road being unfenced, and not for that injured or killed by the trains of the other.[12] Nor is this rule changed by the fact that the lessor had the right to fix the time table, subordinate to which the lessee trains were operated, and was also bound to keep up the fence.[13] In Michigan, a company operating the road of another company under a general contract, is the agent of the latter company within the terms of the statute, and is liable as such.[14] In Indiana, in a case where a lessee operated a road in its own name, and not in the name of the lessor, it was held that the lessor was not liable for an injury to stock caused by a negligence of the employees of the lessee;[15] and in Kansas it was held that a company operating a railroad for the benefit of bondholders and stockholders of the railroad, was not an assignee or lessee, but was a "railroad company" within the terms of the statute, and was therefore liable. [16]

Statutory Powers.—The statutes of the various States authorizing railroad companies to lease other lines of road are much the same. In all of the States this power exists, sometimes under general, sometimes special acts. These statutes, in general, provide that such leases may be effected where the lines of road are continuous or connected and not competing upon such terms and conditions as may be agreed upon between the companies. They further provide that a meeting of the stockholders shall be called for such purpose by the directors on thirty or more days notice to each stockholder, at such time and place, and in such manner as is provided for the annual meetings of the companies, and the holders of at least two-thirds, or a majority in some States, of the stock of each company in person, or by proxy, at such meeting assent thereto.

In some States it is further provided that the lessor company shall remain liable as if it operated the road itself.[17] In Indiana, that the lessees shall be liable jointly with the company operating the road for stock killed or injured.[18] In Iowa, that the corporation operating the road of another shall be liable in the same manner and to the same extent as though such railway belonged to it.[19] In Kansas, lessees are held liable for injuries to stock, whether caused by their negligence or not. [20]

The following is the statutory provision of the State of Alabama, authorizing railroad companies to lease, and the provisions of most of the States are about the same, with exceptions to be noted: "Any railroad company heretofore or hereafter incorporated may, at any time by means of subscription to the capital of any other company or otherwise, and such company in the construction of its railroad, for the purpose of forming a connection with the road owned by the company furnishing aid; or any railroad company organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, if the lines of said road are continuous or connected upon such terms and conditions as may be agreed on between the companies respectively; or any two or more railroad companies whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; but no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies has been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such

[9] Ballow v. Farmer, 9 Allen, 57.
[10] Bower v. Burlington, etc. R. Co., 42 Ia. 546.
[11] Pierce on Railroads, p. 411.
[12] Stephens v. Davenport, etc. R. Co., 36 Ia. 327.
[13] Clary v. Iowa Midland R. Co., 37 Ia. 344.
[14] Bay City, etc. R. Co. v. Austin, 21 Mich. 390.
[15] Pittsburg, etc. R. Co. v. Hannon, 60 Ind. 417.
[16] Union Trust Co. v. Kendall, 20 Kan. 515.
[17] Arkansas Acts 1881, p. 79, sec. 2; Missouri Rev. Stat. 1879, vol. 1, p. 135, sec. 790.
[18] Indiana Stat. 1876, p. 751, sec. 1.
[19] Iowa Code 1873, p. 238, sec. 1300.
[20] Kansas Comp. Laws 1881, p. 784, sec. 30.

company represented at such meeting in person or by proxy and voting thereat, shall have assented thereto." [21]

In Arkansas a similar statute provides that a railroad company "which may have built its road to the boundary line of the State, may extend into the adjoining State or the Indian Territory, and for that purpose may build or buy or lease a railroad in such adjoining State or the Indian Territory and operate the same;" that "railroads may lease or purchase all or any part of a railroad real estate and other property, the whole or part of which is in the State, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at any point either within or without the State. Sixty days notice by advertisement published in a daily or weekly newspaper published in Little Rock, Arkansas, of a meeting called by the directors for that purpose necessary. A two-thirds vote (two-thirds of issued capital stock) in person or by proxy, required." It is further provided that "a corporation in this State leasing its road to a corporation of another State, shall remain liable as if it operated the road itself, and a corporation of another State being the lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue or be sued in all cases and for the same causes and in the same manner as a corporation of this State might sue or be sued if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other." [22]

In California: "Railroad corporations doing business in this State, and organized under any law of this State or the United States, or of any State or Territory thereof, have power to enter into contracts with one another, whereby the one may lease of the other the whole or any part of its railroad, or may acquire of the other the right to use in common with it the whole or any part of its railroad." [23]

In Colorado, the provisions of the statute extend to corporations organized under the laws of "an adjoining State or Territory," which may lease any part or all of a "railroad constructed by another company in or without this State." The words "not competing or parallel" are used in this statute, though not in those above cited. Thirty days notice is required of a meeting of the stockholders, and a two-thirds vote necessary. [24]

In Connecticut: "No lease of any railroad hereafter made shall be binding on either of the contracting parties for a period of more than twelve months, unless the same shall be approved by the stockholders of the company or companies that are parties to the lease by a vote of two-thirds of the stock represented in person or by proxy at a meeting of the stockholders called for that purpose, and at least one month's notice shall be given of such meeting by advertising twice a week for four weeks in a daily paper published in the State, and also by mailing a copy of the call and of the lease to each stockholder, and said notice and call shall state that at the meeting the lease will be submitted for the approval of the stockholders." [25]

In Dakota Territory: "Railroads organized in pursuance of law either within this or any other Territory or State, may lease or purchase any part or all of any railroad," etc. A two-thirds vote is required. [26]

In Illinois: "All railroad companies incorporated or organized under, or which may be incorporated or organized under the authority of the law of this State, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads or any part thereof." [27]

In Indiana: "All railroad companies now organized, or that may be hereafter organized under the law of this State, having connecting roads, may enter into contracts by their respective boards of directors, by which the locomotives and trains of one railroad company for the transportation of freight and passengers may be run and be operated over and upon the track and road of another railroad company, upon such terms as the said com-

[21] Alabama Code of 1876, sec. 2011.
[22] Arkansas Acts 1881, p. 79, sec. 2.
[23] California Amend. to Civil Code, Sup. Par. 5456, sec. 2; Approved April 3, 1880.
[24] Colorado Session Laws 1881, p. 68.
[25] Connecticut Laws 1878, p. 302; approved March 27, 1878.
[26] Dakota Civil Code 1877, p. 306.
[27] Illinois Stat. (Hurd.) 1877, ch. 114, p. 766, sec. 34; p. 1146 Cothran's Annotated Code 1880.

panies may agree upon." And it is further provided that such railroad shall be liable to third persons for all damages occasioned as though the company owned the track;[28] and also as above stated, that "lessees, assignees, receivers and other persons running or controlling any railroad in the corporate name of such company, shall be liable jointly with such company for stock killed or injured by the locomotives," etc.[29]

In Iowa: "Any such corporation may sell or lease its railway property and franchises to, or make joint running arrangements with any corporation owning or operating any connecting railway, and the corporation operating the railway of another shall, in all respects, be liable in the same manner and extent as though such railway belonged to it, subject to the laws of this State."[30]

In Kansas, the same provisions exist as in the Alabama statute, with the addition that the corporation may lease its road to any other railroad organized under the laws of this State, or to any railroad company duly organized and existing under the laws of an adjoining state, whose line of railroad shall so connect with the leased road as to form a continuous line. To be approved by owners representing two-thirds of the capital stock of each of such companies at a meeting called for that purpose.[31]

In Louisiana special laws are enacted for this purpose.

In Maine, "No corporation can assign its charter or any rights under it, lease or grant the use, or control, of its road, or any part of it, or divest itself thereof without consent of the legislature. On complaint of a violation of these provisions by any person, the attorney general is to file an information in the nature of a writ of *quo warranto* against the corporation, and the court may enter such decree as justice and equity may require."[32]

In Maryland, "No railroad company heretofore, or hereafter, incorporated under the laws of this State, shall enter into any agreement for the consolidation of such railroad company with any other railroad company, or aid any other railroad company in the construction of its railroad by means of subscription to the capital stock of such other railroad company, or otherwise; or shall lease or purchase all, or any part, of any railroad constructed by any other railroad company, without the authority of an act of Assembly authorizing it to enter into such agreement, or give such aid, or to make such lease or purchase, being first had and obtained."[33]

In Massachusetts, "Any railroad corporation created by this State may lease its road to any other railroad corporation so created with whose road it connects, or which it intersects, upon such terms as the directors may agree, and as may be approved by a majority in interest of the stockholders of each corporation at meetings duly called for the purpose; and copies of such contracts, or leases, shall be deposited with the board of railroad commissioners," etc.[34] And further, "The roads of two railroads shall be deemed to enter upon each other, connect or intersect, within the meaning of section 170 of chap. 372 of the act of the year 1874, if one of such roads enters upon, connects with, or intersects a road leased to the other road, or operated by it under a contract as authorized by said section."[35]

The Michigan statute upon this subject is similar to the Indiana statute.[36]

In Minnesota the statute is similar to the Alabama statute,[37] a two-thirds vote required. A subsequent act extends the provisions of the statute to foreign corporations, and prohibits leasing of parallel, or competing, lines.[38]

In Missouri, companies may lease railroads "in adjoining States, or in this State, if the lines are continuous or connected." Sixty days public notice is required of a meeting called by the directors and the holders of a majority of the stock of the company in person, or by proxy, assenting thereto, or the holders of the majority of stock of such company assenting thereto in writing. It is further provided that corporations of that State leasing their road to corporations of another State shall remain liable as if they

[28] Indiana Acts 1873, p. 186.
[29] Id. 1876, p. 751, sec. 1.
[30] Iowa Code 1873, p. 238, sec. 1300, ch. 84.
[31] Kansas Comp. Laws, 1881, p. 784, sec. 30.
[32] Maine Rev. Stat., 1871, p. 453, sec. 26.
[33] Maryland Rev. Code, 1878, art. 41, sec. 21, p. 359.
[34] Massachusetts Supplement to Gen. Stat., vol. 1, 1860-72, ch. 180, p. 967; Acts and Resolves, 1874, ch. 372, sec. 170.
[35] Massachusetts Acts and Resolves, 1880, ch. 205.
[36] Michigan Laws, 1873, p. 520, sec. 28.
[37] Minnesota Stat., 1878, sec. 69, p. 382.
[38] Minnesota Laws, 1881, ch. 94, p. 109.

operated the road themselves, and a corporation of other States being lessees of railroads of that State shall likewise be liable for the violation of any of the laws of the State, may sue and be sued, etc., but a satisfaction of any claim or judgment by either of the companies shall discharge the other.[39] A subsequent act extends the right to lease to railroads of "any State," in addition to that of "adjoining States."[40] The Constitution of that State prohibits the leasing of parallel, or competing, lines.[41] Such question to be determined when demanded by a jury.

In Nebraska the provisions of the Alabama statute are substantially followed,[42] a two-thirds vote necessary.

In New Hampshire rival and competing roads can not be leased, and "no sale, lease, mortgage or contract, for the use of any railroad, shall be valid unless it shall be in writing, filed in the office of the Secretary of State, and authorized by the legislature."[43]

In New Jersey the general laws authorize companies to lease other roads of that, "or any other State."[44]

In New Mexico leases may be made between companies organized in pursuance of law, either within, or without, the State or territory.[45]

In New York the assent of a majority in amount of the stockholders of the company owning such leased road is necessary at a meeting called for the purpose. By subsequent act, it is immaterial in the case of a railroad not exceeding ten miles in length, whether the assent of said stockholders has been obtained at a stockholders' meeting, or has been individvally given in writing.[46]

In Ohio the same provisions exist substantially as in the Alabama statute. The roads must be "continuous and connected, and not competing."[47] Thirty days notice is required, and the assent of the holders of at least two-thirds of the stock of each company in person, or by proxy, necessary.

In Pennsylvania, "That it shall and may be lawful for any railroad company, or companies, created by, or existing under, the laws of this commonwealth, from time to time to lease, or become the lessees, by assignment, or otherwise, of any railroad, or railroads, or enter into any other contract with any other railroad company, or companies, individuals or corporations, on such terms and conditions as may be agreed upon, whether the road, or roads, embraced in such lease, assignment, or contract, may be within the limits of this State, or created by, or existing under the laws of any other State, or States, and any railroad company, or companies, of this commonwealth, may agree to guarantee in whole, or in part, the payments and covenants, of any such lease, assigned lease or contract, provided, however, that such road, or roads, so embraced in any such lease, assignment, contract or guarantee, shall be connected, either directly, or by means of intervening lines, with the railroad, or railroads, of said company, or companies, of this commonwealth, so entering into such lease, assignment, contract or guarantee, and thus forming a continuous route, or routes, for the transportation of persons and property; provided, further, that the provisions of this act shall in no wise nor by any construction whatever apply to the Pittsburg & Connelsville Railroad Company."[48]

In Tennessee, the several railroad companies may lease any other railroads connected therewith, and upon such terms and conditions as may be agreed upon between the president and directors of the contracting parties.[49] Consent of the stockholders present, or represented at a regular annual meeting necessary, which consent shall be manifested by a vote of three-fourths of the stock present, or represented at such annual meeting in favor of such leasing.[50] The roads must be connected with each other by a subsequent statute, directly, or by means of intervening lines.[51]

In Texas an express prohibition exists against leasing "parallel" or competing lines.[52]

[39] Missouri Rev. Stat., 1879, vol. 1, p. 135.
[40] Missouri Laws, 1881, p. 75.
[41] Missouri Const., 1875, art. 12, sec. 17.
[42] Nebraska Laws, 1873, sec. 94, p. 190.
[43] New Hampshire Gen. Laws, 1878, ch. 158-9.
[44] New Jersey Revision, 1709-1877, p. 930.
[45] New Mexico Laws, 1880, p. 471.
[46] New York Gen. Stat., 1880, ch. 349, sec. 1.
[47] Ohio Rev. Stat., 1880, secs. 3300-3301.
[48] Pennsylvania Laws, 1870, p. 31; also Pennsylvania Const., 1874, Art. XVII., sec. 17, prohibits railroads controlling parallel, or competing, lines.
[49] Tennessee Code, 1858, sec. 1424; Statutes of Tennessee, 1871, sec. 1424.
[50] Tennessee Act, 1867-8, ch. 72, sec. 1.
[51] Tennessee Act, 1869-70, ch. 50.
[52] Texas Rev. Stat., 1879, p. 610, arts. 4246-7.

In Vermont: "Railroad companies in this State may make contracts and arrangements with each other and with railroad corporations incorporated under the laws of the United States, or under the authority of the Government of Canada, for leasing and running the roads of the respective corporations, or a part thereof, by either of their respective companies." [53]

In West Virginia a railroad corporation "may lease its railroad for a term of years to any corporation owning, or operating any connecting line of railroad wholly, or partly, within this State, in order to make a continuous line of railroad to be run and operated with, or without, change of cars, or break of bulk, or transfer of passengers or freight." [54] The Constitution of said State prohibits obtaining possession or control of a parallel, or competing line, by lease or other contract, without the permission of the legislature.[55]

In Wisconsin, "Any railroad corporation whose line is wholly within this State, may lease or purchase the railroad franchises, immunities, and all other property and appurtenances thereof of any other railroad corporation, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line with, or without, branches." But no railroad company shall lease any other railroad corporation which owns, or controls, a parallel, or competing line, to be determined by a jury.[56]

W. H. WHITTAKER.

Cincinnati, Ohio.

53 Vermont Rev. Laws, 1880, ch. 154, sec. 3303.
54 West Virginia Acts, 1877, ch. 106, p. 137.
55 West Virginia Const., art. XI., sec. 11.
56 Wisconsin Laws, 1880, ch. 260, p. 294, approved March 15, 1880.

STATUTE OF LIMITATIONS — CONCEALED FRAUD.

GIBBS v. GUILD.

English Court of Appeals, March 16, 1882.

1. Concealed fraud and absence of reasonable means of discovery will, if pleaded, prevent the application of the statute of limitations.

2. In an action to recover damages for fraudulent representations, the defendant pleaded the statute of limitations, to which the plaintiff replied that he did not discover, and had not reasonable means of discovering, the fraud within six years before the commencement of the action. The defendant demurred. *Held*; that the reply was good.

This was the defendant's appeal from a decision of Field, J., overruling a demurrer to the plaintiff's reply.

The action was for fraudulent representation, the plaintiff alleging that the defendant made certain false statements, whereby he was induced to take shares in a certain company.

Petheram, Q. C., and *Ram*, for appellant.—In an action at law before the Judiciary Act, 1873, the reply would have been bad. Clark v. Hougham, 2 B. & C. 149; Imperial Gas Co. v. London Gas Co., 2 W. R. 527; 10 Ex. 39; Hunter v. Gibbons, 5 W. R. 91; 1 H. & N. 456. In Knox v. Gye, L. R. 5 H. L. at p. 672, Lord Westbury said: "By the statute of limitations it is enacted that all actions of account and upon the case shall be commenced and sued within six years next after the cause of such action or suit, and not after;" and in *In re* Greaves, 30 W. R. 550, L. R. 18 Ch. D. 551, Jessel, M. R., in referring to Sterndale v. Hankinson, 1 Sim. 393, said: "That decision, therefore, depended upon a variety of circumstances. * * * In the first place, the statutes of limitations did not affect dourts of equity, because it only applied to what were called common law actions. If any action is properly described by the statute of James, that statute applies to the action now before the court, whether it is brought in one court or another; and the statute is subsequently binding upon the High Court—there is no question about that—in every case to which it applies."

They cited Booth v. Earle Warrington, 4 Bro. P. C. 163; Bree v. Holbeck, 2 Doug. 655; Clark v. Hougham, 2 B. & C. 140; Bond v. Hopkins, 1 Sch. & Lef. 413; Blair v. Bromley, 5 Hare, 542; Craig v. Phillipr, 26 W. R. 293, L. R. 6 Ch. D. 249.

T. W, Chitty and *Evans* (*Webster*, Q. *C.*, with them), for respondent. Booth v. Earl Warrington is in the respondent's favor. In Trotter v. Maclean, 28 W. R. 244, L. R. 13 Ch. D. 574, Mr. Justice Fry says, "The statute of limitations imposes the term of six years as the limitation in actions of trespass, and although the present is a proceeding in a court of conscience, it is undoubtedly in respect of a trespass, and it appears to me that the period of limitation imposed by the statute ought to apply to proceedings in this court in respect of a trespass, unless there be some equitable ground for repelling the application of the statute. Such an equitable ground has, in many cases, been found in fraud. When fraud or other equitable circumstance exists, undoubtedly the statute will not apply." The Ecclesiastical Commissioners v. Northeastern Railway, L. R. 4 Ch. D. 845, 25 W. R. Dig. 158; South Sea Co. v. Wymondsell, 3 P. Wms. 143; and Bond v. Hopkins, 1 Sch. & Lef. 633, show that in cases of fraud the statute of limitations does not begin to run until the fraud is discovered. Blair v. Brom-

ley is in our favor. Rolfe v. Gregory, 13 W. R. 355, 34 L. J, Ch. 274, is to the same effect.

They also cited Sherwood v. Sutton, 5 Mason, 145; Brown v. Howard, 2 Brod. & Bing. 73; and Austin v. Byron, an unreported case in the Common Pleas Division, in which Lord Justice Holker was engaged as counsel.

LORD COLERIDGE, C. J.—I am of opinion in this case that the judgment of the court below was right, and must be affirmed. This is a case raising an important consideration, and it has been well argued on both sides, and every case which brings relevant law to bear upon it has been cited. The point is, I apprehend, this: An action is brought (it does not signify whether for the recovery of a specific sum of money, and interest on that sum, or for the recovery of the money sued for as damages), but in either case the action is brought in consequence of the alleged fraud of the defendant. The plaintiff says, Give me back a sum of money which has been taken out of my hands, together with interest for the time it has been out, for you (the defendant) got it by fraud. The defendant says, True, I did so, but assuming I did so, it was more than six years ago. The statutes of James says no action on the case shall be maintained after six years from when the cause of action arose. To that the plaintiff replies, That would be so under the statute as a general rule, but in this case you have no right to set up the statute, because you (the plaintiff) concealed from me the fraud during six years; you have by fraud made the statute to run in your own favor, and you can not therefore turn it to your own advantage.

Now, it seems to me to be clearly admitted that if we went upon the principles of strict common law actions and pleadings, there at least two decisions in point in favor of the defendant that such a replication under the old system of pleading would not be enough; those decisions are Hunt v. Gibbon, and Imperial Gas Co. v. The London Gas Co. Therefore there are at least two decisions in favor of the defendant, and I think it is useless if there are two cases in point to deny that it is so. It is also clearly admitted that if this had been a suit instituted in court of equity before the Judicature Act, to recover back money obtained by fraud, the replication which is made in the case would, if the statute had been pleaded in equity, have been sufficient. The case of Booth v. Earl Warrington is admitted to be clearly in point if the case were a case of pure equity proceedings, as the other cases are admitted to be in favor of the defendant if the proceedings were at common law. Booth v. Earl Warrington is a case binding upon us. It is not necessary to rely solely on that case, because its principles have been adopted in later cases, and it is not necessary, as it seems to me, to go through all the various cases one by one which have been decided by eminent judges in which that case has been acted upon.

I have before me the case of South Sea Company v. Wymondsell, in which Booth v. Earl Warrington was expressly cited. In that case the Lord Chancellor had the matter before him, and decided the case of the South Sea Co. v. Wymondsell, upon the authority of Booth v. Earl Warrington. The cases will all be found collected in the two judgments which have been cited in volumes 1 and 2 of Schoales and Lefroy—Bond v. Hopkins and Hovenden v. Lord Annesley — in both of which cases are elaborate judgments of Lord Redesdale's, giving in each case a dissertation upon the principles which may have actuated the courts of equity in administering this exception, if so it is to be called, in the statute of limitations. It would be very presumptous in me to attempt to give the same facts in other language, but I apprehend that the sense is this: The statute of limitations does in one sense bind the courts of equity just as much as it binds the courts of common law, because equity follows the law, and legal rights will, in the absence of any special reason, be also the equitable rights of a suitor, and in ordinary cases the statute of limitations applies, not, he is careful to say, by analogy, but because of the obedience which the courts of equity owe to statute law; but it has always been the principles of equity, while admitting certain legal rights, to see that particular persons shall not avail themselves of their legal rights; not that equity interferes with the law, but they say that in a particular case it is unjust for the plaintiff or defendant to insist upon their legal rights. I do not admit that courts of equity have, in the language of a very learned person, "ingrafted an exception" upon the statute of limitations by administering it in the way they have done here. It depends upon what you mean by the words. If by ingrafting an exception upon the statute the meaning is that a court of equity will prevent a particular person from taking advantage of his own wrong, then it is true, but if it is meant that the courts of equity have altered the terms of the statute, then I demur to the correctness of the expression. It is enough if one's mind appreciates what one wishes to convey, and I think that courts of equity in dealing with the statutes of limitations have dealt with it as they deal with every other legal right, not to abrogate it, but to say that in particular cases it must not be exercised.

Now, what has been done by courts of equity in cases of this sort? They say that the statute applies, and that the statute runs as it runs here, in cases where the cause of action and the knowledge of the cause of action are contemporaneous acts. They have said that where the cause of action is created, but its existence is concealed from the person who ought to take advantage of it by the fraud of the person who creates it for more than six years, that there he shall not take advantage in his own favor of the wrong he has done, and that a fresh equity exists from the moment that his fraud in concealing the cause of action is discovered, and from that time a fresh cause of action accrues, and that to that fresh

cause of action the statute of limitations will be applied by the courts of equity. This being a demurrer, I must assume the fact to be that the cause of action was created more than six years ago, but that the cause was concealed from the plaintiff for such a length of time as to make this action within the fresh start, so to say, which, according to the rules of equity, as I have tried to explain them, exists now. That being so, if this were an equitable proceeding, it seems to me to follow from the cases I have cited that the plaintiff should be entitled to succeed on this replication. Then the question is, how is this proceeding to be regarded, as one in a court of law, in which I admit the defendant will succeed, or as one in a court of equity, in which the plaintiff will succeed? Strictly speaking, and using correct language, it is neither. It is an action in the High Court of Justice created by statute in the year 1873, by operation of which common law and equity were both, in a certain sense, abolished. So far as they conflict they were not allowed to conflict with one another, and the High Court of Justice was ordered to administer justice according to law and equity together. It seems to me plain that it is fallacious to treat this case as if it were an action at common law or a suit in equity before the Judicature Act, 1873. We have to consider what is the operation of the Judicature Act, 1873, upon the two old systems so far as they conflict. Under that act the rule is that each division is to administer justice with so much of each of the old systems as may be neeessary, but equity modifies the law.

This is an action to recover money back or for damages, and there is a defense which, before the Judicature Act, would have been valid. But we are no longer bound by what courts of common law have done. We have to see what courts of equity would have done under like circumstances. It seems to me that, without pledging myself on the 11th sub-section of the 24th section, but basing my opinion on the Judicature Act, 1873, sections 23 and 24, we are bound to give relief such as a man would have had in a court of equity. and to uphold the judgment of the court below. It is true that the two cases to which I have referred are not binding upon courts of co-ordinate jurisdiction; they are not binding upon this court. It has not been necessary to consider what the principle of the common law pleading was in an action of this kind, where fraud was a reply to the plea of the statute of limitations. It is sufficient to say that the case is not concluded in the Court of Appeal, and that there are *dicta* of great judges in which, at least, it may be a question whether, even if this case had to be looked at as a common law question, this court would not have arrived at the same judgment as it has come to now, upon the joint operation of the principles of common law and equity under Judicature Act, 1873. I do not decide that because it is not necessary, but I desire to say that Lord Mansfield, and Mr. Justice Holroyd, and Mr. Justice Best, and other authorities, at all events, seem to show that the matter is by no means one which is incapable of argument in the Court of Appeal.

BRETT, L. J.—The Judicature Act of 1873 does not change the rights or remedies of any person. All that it has done is to say that some remedies are to be administered as they were administered before; but that, instead of being adn instered by different courts, they must be administered by the same one. It seems to me that this case must be decided on these rules, that this court will administer every equity which a court of equity could have done, so that the court will grant the same relief as a court of equity could have granted.

The next proposition is that a court of equity would have relieved the plaintiff in this case. It was suggested that as the names of actions are changed, there is no longer an action on the case, or one of trespass, and that the statute of limitations no longer applies; but I am of opinion that the Judicature Act did not touch the statute of limitations at all, but that it still applies to circumstances which constituted the actions named in it—that is to say, that, although the names are not retained, yet that the court will interfere if the facts are such as would have supported these actions. The great argument has been that a court of equity would not have afforded the plaintiff relief in this case, because the facts would have constituted a common law action, and therefore that, if the statute of limitation applies, the statute begins to run from the occurrence of the cause of action. It seems to me that, for the purposes of this case one must consider that all actions may be divided into three kinds:—(1) Those arising out of transactions in which the only remedy would be a suit in equity; (2) others in which there would be a remedy at law, but none in equity; and (3) cases in which there would be a remedy in both courts.

In cases in which the only remedy was in equity, it is admitted that the courts of equity, whether by analogy or whether they considered themselves bound by the statute—I think because (upon the authority of Lord Redesdale) they thought themselves bound by the statute of limitations — where the transaction was within the meaning of the statute, recognized the statute as binding; and if there were nothing but the cause of action, and the cause of action had arisen more than six years before the commencement of the suit, the court of equity interpreted the statute as a court of law did. The court of equity applied a particular kind of equity in cases where the cause of action arose longer ago than six years. They said that if the existence of the cause of action given by the defendant was fraudulently concealed from the plaintiff until a period beyond six years, then that they would not allow a defendant to prevent a plaintiff from supporting his right to relief.

It seems to me that there is some little confusion in the expressions used in some cases as to the origin of the cause of action being a fraud. That

is not a fraud which raises the equity in question. Assuming that the cause of action was not the fraud, but if the cause of action was fraudulently concealed by the defendant, who had given that cause of action to the plaintiff, it was then that his equity arose, although the cause of action arose six years before.

Now, to take a case in which the cause of action was one which could only give rise to a remedy in a court of law and the statute of limitations was pleaded, and although it was attempted to answer the statute by a replication that the cause of action had accrued more than six years before, still it was said that the cause of action had been fraudulently concealed from the plaintiff by the defendant until within six years. It was certainly held in two cases that such a replication could not be supported as a legal replication, or as an equitable replication pleaded in a court of law. But I know of no case deciding whether a court of equity would, under such circumstances, have prevented a defendant from pleading the statute of limitations in a court of law. All that those cases, where the judges refused to allow the equitable replication, decided was that a court of equity would not have granted such an injunction without terms. I doubt the correctness of that view, and I doubt, taking into consideration the doctrines of Lord Mansfield, Justices Bailey, Holroyd and Best, and Chief Justice Dallas, whether the replication could not now be allowed in the Court of Appeal to be a good one at law. I think that it is not necessary to decide that point in the present case. This case seems to be one in which the transaction is such that there would, before the Judicature Act, 1873, have been a concurrent remedy—that is to say, a remedy in a court of equity or in a court of law.

This action is founded upon an allegation that fraud was committed by the defendant, and a fraud by which money was obtained from the plaintiff, and the plaintiff claims to have back the money and interest for the time during which he has been kept out of his money. That a certain action would have lain can not be doubted, and the money could have been recovered in an ordinary action, with or without interest, as the jury liked. Would a suit have been maintainable, and would the remedy in a court of equity have been the same? That depends upon what was the real decision in the case of Booth v. Earl Warrington. It was argued that that case did not decide that in such an action as this the sum could have been recovered. The suit was brought in respect of alleged fraud, by which money had been obtained from the plaintiff, and the remedy sought for was the recovery of the money. That case was entertained in a court of equity, without any question as to whether the suit could be maintained. It was assumed and taken for granted that the original cause of action gave rise to the remedy sought for, but in that case the statutes of limitations was pleaded, and this equity of the concealment of the cause of action was given as an answer to the defense of the statute of limitations, and it was argued that because there would have been the same remedy in a court of law, as that transaction was one which would have given rise to an action on the case, the statute was, therefore, a bar, and that the statute began to run from the time of the accruing of the cause of action. It was also urged that the statute must therefore bind a court of equity, because the transaction was one which would have supported an action on the case in a court of law—that is to say, assuming the remedy to be concurrent, that the statute would have been a bar in a court of law, and therefore it would also be a bar in a court of equity. That was the very point taken. The House of Lords asked the judges these three questions: 1. Would there have been a right of action which would result in the same remedy in a court of law as in a suit in chancery? The judges answered that it could; and they must have answered so, for it is so, clearly. 2. When in the court below did the cause of action accrue? In that case the original cause of action was the alleged fraud, and the question was argued as to when the cause of action in respect of that fraud accrued? It would seem that there must have been a dispute as to whether it accrued at the time of the fraud, or at the time when the money was paid. I suppose the judges said that the cause of action was not the fraud, because, at common law, fraud which gives no result gives no cause of action. It is the result of the fraud which is the cause of action, and, therefore, the cause of action would accrue when the money was paid, but that was more than six years before the suit was brought, and, therefore, the cause of action accrued more than six years before the suit. Then it was asked, presumably because there is a concurrent jurisdiction in a court of equity and in a court of law, if you answer the first two questions in the affirmative, does that, in your opinion, prevent the application of an equitable doctrine in a court of equity? The answer, according to the decision, must be that it did not. The House of Lords held that it did not. Therefore, that seemed to me to be a case in point, and that this case is one which would have been entertained in a court of equity, and would have obtained a remedy in a court of equity.

Now, was that the real meaning of Booth v. Earl Warrington? It seems to me that it was declared what was the true meaning of that case in Hovenden v. Lord Annesley. It has been an accepted doctrine from that time to this; it has been taken as true. Then, in the case of Blair v. Bromley, the suit was to recover money obtained by fraud, just like this suit, but it was said that the statute of limitations should not be relied on by the defendant. The existence of the cause of action was kept from the plaintiff. That was decided upon the authority of Booth v. Earl Warrington. It was decided in a court of equity upon that authority, and was taken on appeal to the lord chancellor, sitting in appeal, and we, there-

fore, have, besides the decision of the House of Lords, the opinion of the lord chancellor sitting as a court of co-ordinate jurisdiction with us, and we are bound to say that equity and law construe and apply the statute of limitations in the same way, and we are bound to say that equity, in cases like this, would have entertained this suit as an equitable suit, and would have given the remedy the plaintiff claims, but they would have applied their own equitable doctrine to prevent the defeating the plaintiff by pleading the statute of limitations.

That doctrine was recognized in the case of the South Sea Company v. Wymondsell, and, if that be so, we are in this position in the present case. It is true this case might be treated as an action brought in a common law court, but it may also be treated as if it were a suit in equity before the Judicature Act. We have no right to say it is not a suit in equity merely because it is brought in the common law division. We are bound to treat it as if it were a suit in equity, and if it be a suit in equity, then we are bound by the equity authorities of a court co-ordinate with this, and of a court superior to this, to say that, under the given circumstances, the plaintiff is not deprived of his remedy by reason of the plea, because the replication sets up an equity which would be granted to the plaintiff by a court of equity. We must administer that rule of the court of equity and say that the judgment of Mr. Justice Field was and must be affirmed.

HOLKER, L. J.—I am sorry I have to differ from the rest of the court. I have formed an opinion on this case, and am bound to give expression to it. The question is how, in dealing with the statute of limitations, are you to ascertain from what period that statute begins to run in a case like this? It is said that in a case like the present you are to say that the statute runs from the period mentioned in the statute itself, viz.: the accruing of the cause of action, but it is contended, on the other hand, that you are to do nothing of the kind, but you are to disregard the language of the statute and say that it is from the time the fraud has been discovered, or from the time that the fraud was concealed. It will be important to find out how the law stood before the Judicature Act, 1873, and what law was administered by the courts of law and equity. Many cases have been cited to show the court what the law was, but I think that, when they are considered, it will be clear that there is no difference of opinion as to what the law was, and that if you examine the cases you will find that in the courts of common law dealing with common law proceedings, or rather with actions within the language of the statute of limitations, the common law acted upon the language of this statute, and, it is said, decided that the statute should not be a bar until the lapse of six years after the cause of action arose; and common law said that the cause of action in cases like this was the fraud, and not the discovery of it, and, though it may be imperfect legislation, we must deal with it as we find it; and it having said that an action is to be barred six years from the time that the cause of action accrued, we must adopt that view, for we can not make legislation for ourselves. That was the doctrine of the common law courts in Hunter v. Gibbon and Imperial Gas Company v. London Gas Company. Both these cases are recent ones, and they declared the law without any doubt. They were decided by very eminent judges, and if the common law rule had been different from that they said it was, I do not think that the difference could have escaped them. The rule in equity was different, and upon the case relied upon by Lord Justice Brett—Booth v. Earl Warrington, and other cases which support the doctrine laid down there—I will say this—I do not know whether Booth v. Earl Warrington is decided rightly or not, for it is very short, and was a case in the House of Lords, but it is binding upon me; but it is an equity decision. It may be that Booth v. Earl Warrington is not a decision such as is supposed. It is difficult to understand these questions, and it may be that the House of Lords thought that in Booth v. Earl Warrington there was no sufficient remedy by a proceeding at law, and that the only remedy was in equity, and that there was no remedy in equity which came within the language of the Statute of Limitations. It is enough for me to say that Booth v. Earl Warrington and the cases which followed it can not disturb this I have cited, because that was a decision as to the law administered and the rule adopted in the court of equity. The common law rule was that the judges felt themselves bound by the Statute of Limitations, and disregarded the equitable considerations that might exist in the cases. Equity took a more liberal view of the matter, and said it was very unjust to say that the Statute of Limitations runs from the time of the arising of the cause of action in a case of fraud, and, I think, it may be said also in a case of concealed damage, whether by fraud or not, but in such a case the Statute of Limitations must still be a bar from the time when the fraud was discovered. That was not the doctrine of courts of equity in all cases, because the authorities cited are sufficient to show that where there was a proceeding in a court of equity which came within the definition or the description of the proceedings mentioned in the Statute of Limitations, they were bound by the strict language of the statute like courts of common law. To put it shortly, if there was a proceeding in equity which was like a proceeding in an action on the case, or in trespass, then the courts of equity would say that the statute bound them as much as common law courts. I thought that Acts of Parliament were omnipotent and could not be got rid of by declarations of courts of law.

Then we come to other cases where the rule was different, in such cases as this, for instance, where the proceeding in equity was not within the language of the Statute of Limitations. In those

cases the courts of equity said that there should be a limit, and though not bound by the Statute of Limitations, they would act in the spirit of it, and say that in this case, if a man had been guilty of laches for some time he should be barred of his remedy. But they said: "We will not extend this rule, which is only a rule we have made ourselves to act upon the analogy of the Statute of Limitations in cases where we might work injustice." Therefore courts of equity have said that the Statute of Limitations runs from the time of the discovery of the fraud, and not from the time of the happening of it. According to the doctrine of the common law, with reference to ascertaining when the statute shall begin to run, the rule has been that the arising of the cause of action is to be the period; and in other cases the courts of equity, acting in analogy, act the other way, and say that the statute runs from the time of the discovery of the fraud.

Now, we come to the important question whether, for the future, the rule of law and equity, in cases to which the Statute of Limitations applies, is to be abrogated or not; and from that seems to me to follow this further question—viz., whether by this decision of this court we are to repeal the Statute of Limitations? If you come to a case you may call it an equity suit or a common law case, which may be an action for damages, trespass or an action on the case. Suppose it is an action to recover back money obtained by fraud, you then declare, by a decision of a court, that the rule which the Statute of Limitations has established shall be done away with, and that for the future the cause of action shall be, and the statute begin to run from, the discovery of the fraud.

Appeal dismissed.

FORGERY — FALSE PRETENSES — JURISDICTION.

IN RE CARR; *IN RE* DILLON.

Supreme Court of Kansas, June, 1882.

1, Where a person forges and utters, at Kansas City, Missouri, a time check upon a railroad company having its treasurer and treasury within this State, and such check is paid off by the agent of the company at Kansas City, having authority to pay the valid obligations of the company, upon the supposition that the check is a true and valid instrument, the forgery is wholly consummated in Missouri, although, afterwards, the agent sends the check to the treasurer of the company at Topeka, Kansas, and is given credit therefor on his accounts as so much cash.

2. Where a person fraudulently and by false pretenses obtains money of a bank in the State of Missouri upon a false and spurious time certificate, purporting to have been issued by a division road master of a railroad company having its treasurer and treasury within this State, and thereafter the bank sends the certificate through its correspondent bank at Topeka for presentation to and payment by the company, and the treasury of the company pays the same within this State: *Held*, that the offense is completed in the State where the party knowingly passes and receives the money on the false and spurious certificate. In such case, the bank is not the agent in sending the certificate to this State for payment, since the party passing the same has gained his full object in Missouri, and prior to the transmission of the certificate. The subsequent payment thereof in Kansas to the holder would not be for the use and benefit of the guilty party originally passing the same.

Original proceedings in *habeas corpus*.

John C. Tarsney and *Joseph G. Waters*, attorneys for the petitioners; *Geo. R. Peck* and *A. H. Vance*, for the State.

During the year 1881, Carr and Dillon were in the employ of the Atchison, etc. R. Co. as section foremen, with headquarters at Kansas City. Both were arrested for offenses alleged to have been committed within the State of Kansas. Carr was charged with forging time checks purporting to be issued by a division roadmaster of the company, upon Edward Wilder, the treasurer of the company at Topeka, Kansas, and alleging therein the amount of money due to the payee thereof for work and labor, and purporting to be indorsed by such payee. He got the forged checks cashed by an agent of the railroad company at Kansas City, Missouri. After an examination before Joseph Read, Jr., a justice of the peace of Shawnee county, Kan., he was committed in default of bail to stand trial before the district court of that county.

Dillon was arrested on the charge of obtaining money under false pretenses within the State of Kansas from the Atchison, etc. R. Co. It was alleged in the complaint, among other matters, "that as a section foreman he had authority and was directed to certify to the company the time and amounts of money due from the company to the laborers under his charge and control for work performed by them for the railroad company, and that he did unlawfully, feloniously and falsely pretend to the railroad company, with intent to cheat and defraud the company by means of certain false writings, to-wit, time certificates, time books, board bills and time checks or discharge tickets; that the persons therein named had worked for the company and under his charge and control, and were entitled to receive from the company the amounts of money therein named, to-wit, several hundred dollars, which said time checks for said persons and said amounts were duly given to the division roadmaster, E. J. Coleman, and a false report of the same, showing names and amounts due each of said persons made out in a book called a 'time book' for said division roadmaster's information, and upon said false time certificates and reports, and said time books, the said E. J. Coleman, division roadmaster of the railroad company, made false time checks for said persons aforesaid, and for the amounts aforesaid payable to the order of said persons, and which

time checks were drawn on Edward Wilder, as treasurer of the railroad company, and were paid by Edward Wilder as such treasurer, at Topeka, in the County of Shawnee, in the State of Kansas, by means of which said false pretenses the said Dillon then and there unlawfully, feloniously and designedly did obtain from the railroad company the sums of money aforesaid, of the value aforesaid, with intent then and there, and thereby to cheat and defraud the railroad company; whereas, in truth and in fact no such persons worked for the railroad company as laborers during said months under said Dillon, and said railroad company did not owe said persons or any of them, for labor during the periods mentioned, and said persons did not indorse said time checks, and did not receive the money thereon; and the time certificates, reports, board bills and time tickets were wholly false, and the said Dillon, at the time he so falsely pretended as aforesaid, well knew the same to be false." Attached to the complaint were the various time certificates mentioned, containing the names of the persons to whom said certificates purported to issue, with the days that said supposed persons had worked, and the amount pretended to be due to each therefor. Dillon obtained the money from various banks at Kansas City, Mo., who accepted such time certificates from him as true, and paid him the money therefor. He was examined before William R. Hazen, a justice of the peace of Shawnee county, and after his examination, was committed, in default of bail. Petitions were filed in this court for writs of *habeas corpus*. Upon such petitions writs were duly served upon the sheriff of Shawnee county, having the prisoner in custody, to which writs returns were made by the sheriff setting forth the copies of the complaints, warrants and commitments. The evidence produced before the examining magistrates was, also, by agreement of counsel, submitted to the court for examination and consideration.

HORTON, C. J., delivered the opinion of the court:

Although these cases are separate and distinct, and although the offenses alleged are different, we shall consider them together, inasmuch as the facts in each case are very similar, and the cases have been presented to us at the same time. Carr and Dillon were in the employ of the Atchison, etc. R. Co. as section foremen, with headquarters at Kansas City, Mo. Carr was arrested for forging time checks, Dillon for obtaining money under false pretenses from the company. Upon preliminary examinations at Topeka, in Shawnee County, Kansas, it was decided that the offenses charged had been committed; that there was probable cause to believe the petitioners guilty as set forth in the complaints and warrants, and they were ordered to give bail for their appearance before the district court of Shawnee County at the next term thereof to answer therefor. In default of bail they were committed to the jail of the county.

The only question presented for our determination is as to the jurisdiction of the courts of Shawnee County. On the part of the petitioners, it is claimed that the supposed offenses set forth in the several complaints were commenced and consummated in the State of Missouri, and that the defendants are in no wise amenable to the criminal law of Kansas.

On the part of the counsel for the State, it is contended that the petitioners had no intention whatever of defrauding any one but the Atchison, etc. R. Co.; that they only used the banks and other parties at Kansas City as a means to accomplish their ends, and as the time checks finally reached the treasurer of the company at Topeka within the State, and were accepted by the treasurer as genuine, the petitioners, upon coming within the State, were liable to arrest for the offenses charged. In this connection they refer to sec. 21, ch. 82, Comp. Laws of 1879, which reads: "Every person, being without the State, committing or consummating an offense by an agent or means within the State, is liable to be punished by the laws thereof in the same manner as if the prisoner had commenced and consummated the offense within the State."

It appears from the evidence that the company had a freight house, office, agent and a corps of clerks to transact its business at Kansas City. Among other duties, the freight agent at Kansas City had authority to collect money due freight, pay back charges on freight from other roads, and remit the money of the company to its treasurer at Topeka, Kansas. He also had authority out of the funds of the company collected by him to pay off the valid obligations of the company upon proper vouchers. Supposing the checks forged by Carr valid obligations of the company, he made payments thereon within the State of Missouri. Afterwards the checks were sent by him to the treasurer's office of the company at Topeka, and he was given credit for them as so much cash. But the agent drew no money at Topeka on the checks, and the money with which the checks were paid had never been in the treasury of the company at Topeka, or in the possession of the company within this State. It is not claimed that the agent of the company at Kansas City acted in collusion with Carr, and upon the testimony such person was neither his guilty nor "innocent agen." As the forgeries were committed and uttered by Carr within the State of Missouri, and the forged checks actually cashed by the company in that State, the crime was wholly consummated within Missouri. Therefore, in our opinion, upon the evidence submitted for our consideration, the offense was not committed or consummated "by an agent or means within this State," and however criminal Carr may be, he must be tried and punished in Missouri—not here.

Upon Dillon's examination it also appeared that all the transactions with which he was connected were done in Missouri. The false pretenses were made in Missouri, and the money he received was

obtained by him in person in that State. As in the Carr case, so in this case, the time checks finally reached the treasurer of the company at Topeka; but the checks came from banks in the State of Missouri to the Topeka bank and other institutions in the City of Topeka, in the regular order and course of business, and the money that was paid out of the treasurer's office in the City of Topeka on the checks was not paid to Dillon or to any other person for him, or for his use or benefit. "If a man draws a check upon a bank with whom he has no money, and hands it as a good check to another party, it is a false pretense as regards that party, but not as regards the banker." Rex v. Lara, 6 Term R. 565. Counsel for the State seek, however, to charge the sending of the check through the banks to Topeka upon Dillon. What took place after Dillon obtained the money in Missouri he did not order, and is not criminally responsible for. He gained his full object when he obtained the money at Kansas City, and it was a matter of perfect indifference to him whether the banks afterwards did or did not obtain payment on the checks from the railroad company or from any other party. It would have been perhaps much more for his benefit had the checks been lost or destroyed before reaching Topeka.

Upon the evidence produced Dillon was certainly guilty of the offense with which he is charged in Missouri; but can it be said he was guilty of a like offense each time the checks were transferred to a new holder? We think not. Regina v. Garrett, 22 Eng. Law and Equity, 607. These cases are unlike People v. Adams, 3 Den. 190. In that case, the fraud originated and was concocted in Ohio by Adams. But it matured in the City of New York, for there the false pretenses were made and the receipts and drafts presented through the instrumentality of innocent agent employed by Adams, and the signatures and money of the persons defrauded were obtained by Adams throuch such agents in that city. Nor is the case of Commonwealth v. Harvey, 8 Am. Jurist, 69, applicable, as in that case the defendant forged the draft at Albany, N. Y., and placed it in the hands of a broker there, to be forwarded by him to the drawee in Boston, where it was paid and the proceeds remitted to the defendant in New York. These cases are not parallel with United States v. Davies, 4 Sumner, 485, where the defendant was accused of shooting from an American ship and killing a man on board of a foreign schooner; because, upon the evidence, the parties here achieved their full wish and object upon receiving the moneys obtained by them in Missouri. The offenses, therefore, took effect in Missouri; in the one case, when Carr received payment upon the forged papers from the freight agent of the railroad company at Kansas City, and in the other, when Dillon actually obtained in person the money upon false pretenses from the banks of that city.

We fully recognize that the power of the State to punish criminals extends to all persons who, being without the State, commit or consummate violations of the penal statutes within our State, "by an agent or means within the State." Such persons, although out of the State, are, in contemplation of law, within the State. But where a forgery is perpetrated and uttered beyond the State, and the forger actually obtains the money thereon in another State, and before the false and spurious instrument reaches the limits of the State, the offense is consummated beyond this State and the forger is not amenable to the provisions of our statute upon coming within the State. So, also, where a person guilty of false pretenses in another State obtains thereby from a banker or other person in such State, money, he is guilty of false pretenses as regards the party from whom he obtains the money, and may be punished at the place where the money was so obtained by him.

After the petitioners got the money, they had no longer any interest in the uttering or preservation of the time checks, or in the action of the banks or freight agent at Kansas City concerning them. Neither the banks nor the freight agent were moved or asked by them to send the checks to Topeka for payment, or for any other purpose. They probably foresaw and anticipated that the checks would be sent there, but it can not be said that they wished them sent, and therefore their agents did not send or present them to the treasurer of the railroad company. The credit and money obtained upon the checks within this State was not for the petitioners' use or benefit, but solely for the benefit of the agent of the railroad company and the banks who had been defrauded by the petitioners in Missouri. If these petitioners had used the mail to collect the money from the treasurer at Topeka, or had employed the banks or the agent of the railroad company at Kansas City to collect the money for them, or had sent the checks through them for collection, then they would have been guilty of crimes committed within this State through "innocent agents." Then the offenses charged against them would have been consummated "by an agent or means within this State," and although out of the State they would have been, in contemplation of law, within the State, and the right of punishment under the statute of this State would have extended to them. But as the action of the freight agent and the banks at Kansas City subsequent to the payment of the moneys to the petitioners were the separate and independent action of said parties for their own—not the petitioners benefit—the petitioners can not be held here for trial. Therefore, they must be discharged.

WEEKLY DIGEST OF RECENT CASES.

AGENCY—RATIFICATION BY PRINCIPAL.

If one acting as agent without original authority to borrow money on behalf of his principal, does in fact so borrow, and uses it in a manner advantageous to the party to be charged, the ratification of such unauthorized act may be inferred from the silence of the principal after knowledge of the facts. It is his duty, if he does not acquiesce in the unauthorized act, to repudiate it. If he fails to do this within a reasonable time after notice, the jury may draw an inference of ratification. *Breed v. First Nat. Bank*, S. C. Col., April Term, 1882.

CONTRACT—COMPROMISE OF ACTION.

Though a party have a clear and unmistakable right of action, yet he may compromise and settle the same. When such a settlement is clearly ascertained to have been fairly made, the courts will not disturb it. *Berdell v. Bissells* S. C. Col., April Term, 1882.

CONVEYANCE — ADOPTION OF SIGNATURE — ACKNOWLEDGMENT AND DELIVERY OF DEED.

If one acknowledges and delivers a deed to which his name has been affixed by the grantee, the deed is valid. The acknowledgment and delivery are acts of recognition and adoption so distinct and emphatic, that the grantor will not be allowed to deny that the signature is his. The deed is not sustained on the ground of agency or ratification, but of adoption. *Clough v, Clough*, S. C. Me., May 29, 1882.

COSTS—NO IMPRISONMENT FOR COSTS.

Where a judgment is rendered against a party for fine and costs, and he pays the amount of the fine, he can not be imprisoned for the costs, and, if in custody, should be released therefrom, the cost to be collected by an ordinary execution. *Commonwealth v. Wilson*, Ky. Ct. App., May 13, 1882.

DAMAGES—MEASURE OF DAMAGES FOR BREACH OF CONTRACT.

The defendant sold a quantity of shellac of a particular brand to the plaintiff, knowing that it was bought for the purpose of resale, but having no notice of any particular contract to resell. The plaintiff resold the shellac to a third person, and the defendants subsequently were unable to make delivery. There was no shellac of the brand in the market at the time of the breach, so that the plaintiff was unable to carry out his contract with his sub-vendee. *Held*, that the plaintiff was not entitled to recover as damages the amount of profit he would have made on the resale. *Thol v. Henderson*, Eng. High Ct., Q. B. Div., Dec. 3, 1881.

DIVORCE—MODIFICATION OF DECREE.

Where the decree relating to alimony in a libel for divorce gives an annuity for life without reservation, it can not be modified at any time thereafter on motion or petition, and a new trial can be ordered only in cases mentioned in the statute. *Stratten v. Stratten*, S. C. Me., May 29, 1882.

ESTOPPEL — RECITALS IN GUARDIAN'S BOND — SURETY.

The sureties on a guardian's bond are estopped by the recitals contained therein from controverting the fact that the person named therein was in fact the guardian of the wards named in such bond. *State v. Mills*, S. C. Ind., June 15, 1882.

EVIDENCE—WHAT COMPETENT TO ESTABLISH DEED OF GIFT INTER VIVOS.

Where the question is upon the validity of a deed of gift *inter vivos*, intended to operate in effect as a bequest charged with the debts of the donor, testimony touching the motives, reasons and inducements which moved the deceased to bestow his property in that manner, is pertinent to the issues involved in the case. *Gilham v. French*, S. C. Col., April Term, 1882.

EXECUTION—LEVY ON REAL ESTATE—VALIDITY.

As between the parties to an execution it is not essential that a levy upon real estate should be reduced to writing at the time the levy is made. In this case the sheriff notified the defendant that he had levied upon the land, and indorsed the execution "levied," with the date of the levy, but failed to describe the property levied upon. Before the return was written in full the defendant died, and, on motion of his representatives, the levy was squashed. In an action against the sheriff and his sureties for the failure of the sheriff to levy the execution, the levy which was made is held to have been valid. *Demont v. Thompson*, Ky. Ct. App., May 13, 1882.

NEGOTIABLE PAPER — NOTE — INDORSEMENT TO BANK FOR COLLECTION.

When a note is, by an indorsement of the payee, made payable to a bank "for collection," payment by the payor to any person other than the bank or its agent is at the payor's risk, and if payment is made to a fraudulent holder, the payor must bear the loss. *Bennett v. Ringold*, Ky. Ct. App., May 23, 1882.

NOTICE—BY MAIL OR TELEGRAM.

A letter sent by post is presumed, from the known course of that department of the public service, to have reached its destination at the regular time, and to have been received by the person to whom it was addressed, if living at that place, and regularly receiving letters there; and the same presumption has been applied to telegrams. It is for the jury, in view of the evidence, to determine the weight of the presumption as applicable to the facts of the case. *Breed v. First Nat. Bank*, S. C. Col., April Term, 1882.

SET-OFF—DAMAGES FOR DEBAUCHING DAUGHTER.

To an action to recover money obtained by duress of imprisonment upon a void warrant for fornication with the daughter of the defendant when such a charge was groundless, and a mere pretext to obtain the money, the defendant can not set up a counter-claim for the loss of services of such daughter, though an infant, and for care and medical attendance, on account of the plaintiff having debauched such daughter and begotten upon her a bastard child. *Heckman v. Swartz*, S. C. Wis.

SUNDAY — WORK OF NECESSITY — RUNNING RAILROAD TRAIN.

Section 10, art. 17, chap. 29, of the General Statutes of Kentucky, providing that "no work or business shall be done on the Sabbath day, except the ordinary household offices, or other work of necessity," etc., construed as containing no inhibition upon the running of railroad trains on the Sabbath day, such "business" being included in the exception expressed by the words of the statute, *viz.*: "or other work of necessity." The word, necessity, is accurately defined by the rule that the law regards that as necessary which "the common sense of the country, in its ordinary mode of doing business, regards as necessary;" and the

necessity may grow out of, or, indeed, be incident to the general course of business, and yet be within the exception of the act. *Commonwealth v. Louisville, etc. R. Co.*, Ky. Ct. App., May 27, 1882.

SURETY — PROMISSORY NOTE — EXTENSION OF CREDIT.

A parol agreement by the principal to pay interest for a year at eight per cent. is not a good consideration for an agreement by the holder of a note with the principal to extend the time of payment one year after it became due, and such an agreement based on such a consideration does not discharge a surety on the note. *Turner v. Williams*, S. C. Me., May 29, 1882.

TAXATION—SALE OF LAND FOR TAXES.

The power of a collector to sell land for taxes is not unlimited, as to quantity. His duty is to sell no more than is reasonably sufficient to pay the taxes and charges thereon, where a division is practicable without injury. This rule, outside of positive law, rests upon principles of obvious policy and universal justice. *Margraff v. Cunningham*, Md. Ct. App., February 28, 1882.

WILL—MISTAKE—INSERTION OF A WORD WITHOUT KNOWLEDGE OF THE TESTATOR.

A testator, in giving the instructions for his will, directed that all his B shares in a certain company should be given to his nephews, but, by an error, the word "forty" was inserted several times in his will before the word "shares." The will was duly executed by the testator with this word "forty" in it. The jury found that the word "forty" was introduced by mistake, and that the clauses, in which it was, were never read over to the testator, and that he had only approved of the will in the belief that all his B shares were by it given to his nephews, and thereupon the court ordered the word "forty," wherever it occurred in the will, to be struck out. *Morrell v. Morrell*, Eng. High Ct., Prob. Div. & Adm. Div., March 14, 1882.

QUERIES AND ANSWERS.

*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

62. Has any one of the United States ever abolished the grand jury system of proceeding against criminals, or is there now any State in which that system is not in vogue? M. J.

St. Louis.

63. A sued B and obtained judgment. Before issuing execution B assigned all his property to C. Can I obtain order from judge setting aside assignment on the ground of being made with a fraudulent intent, or how am I to go about it? S. T.

Troy, N. Y.

64. A has judgment against B in justice of the peace court. B becomes a member of a joint stock company organized under the laws of Iowa. Is B's interest in the property belonging to the company subject to levy and sale under execution on said judgment?

Sac City, Iowa. M. B. M.

65. John Brown owned a farm of 155 acres in fee simple. He made his will, giving to his son, John H., 95 acres, and to his daughter, Martha A., 60 acres, both subject to the life estate of Mary J., wife of John, the testator. John Brown died July 2, 1858; John H. and Martha A. and the widow all survived him. Martha A. afterwards intermarried with James Marshall on the 5th day of March, 1859; they had as issue one son, Clement Marshall. Martha A. died on the 17th of January, 1861, and her son Clement died on the 28th of same month, and John H. on the 2nd day of February, 1861. The parties all died intestate. Mary J., the widow of John, the testator, died on the 19th of November, 1881, also intestate. The question is, Where is the title to the land owned by John Brown, the testator, at the death of his widow, Mary J. Brown? Does it go to her brothers and sisters. L.

Steubenville, O.

QUERIES ANSWERED.

Query 57. [14 Cent L. J. 459.] The South Carolina statute law provides, "That no mortgage of personal property shall be valid so as to affect the rights of subsequent creditors for value without notice, unless the same shall be recorded," etc. M, the mortgagee of an unrecorded chattel mortgage, after condition broken, takes possession of G's, the mortgagor's, stock of goods to foreclose. C, a subsequent creditor without notice, gets judgment against G, levys execution and seizes the goods that were in the possession of M. First, as between M and C, who has the highest right to the goods? Second, are the rights of a mortgagee of personal property changed by seizure to foreclose, and, if so, how?

Chester, S. C. G. W. G.

Answer. A mortgage should always be recorded. The time is generally fixed by statute. Three months used to be the time required in this State from date of mortgage. The act of 1876, p. 30, changed it to thirty days. There is a penalty for failing to record, at least the effect is defined. When G, the mortgagor, executed his chattel mortgage to M, the duty was clear to record it, to give notice to the world. If a failure to so record caused C subsequently to deal with G, or if the record had been made, C would not have become a creditor of said mortgagor on account of notice, then C would be preferred. We find the same principle applicable to deeds. If a grantor executes two deeds to the same property, at different times, the second deed, if recorded before the first, will secure the title. Why? Because, if the first had been recorded, the second purchaser would have had notice. Code, 2705. Failure to record effects, whom? 9 Ga. 23. C, it appears, would have the highest right to the goods, if he became a creditor on account of those goods. Seizure to foreclose, as G W G expresses it, would be decided by the judge of the court trying the issue, as would be the case, also, when two judgments brought money into court, one judgment would be ruled in favor of, to the exclusion of the other. C would be favored in law, because of M's non-compliance with the South Carolina statute law, requiring record as a condition precedent to affect the rights of subsequent creditors. R. D. W., Jr.

Savannah, Ga.

Query 59. [14 Cent. L. J. 479.] Is an executor empowered to sell real estate under a provision in a will directing the real estate to be sold, not specifying by whom such sale is to be made, for the purpose of paying legacies, erection of tomb-stone, and of fencing graveyard? C. R. N.

Washington, D. C.

Answer. The case propounded by C. R. N. comes clearly within the rule laid down by Sugden on Powers, that where a testator directs his estates to be sold for certain purposes, without declaring by whom the sale shall be made, then the fund, if distributable by the executor, he will have the power of sale by implication, and the reason of the rule is that it belongs to the executor to pay debts and legacies, and the testator having directed that to be done by means of a sale of his land, the executor should have the power to sell as incident to the accomplishment of the testator's main purpose. There can be no doubt as to the executor's power under case stated in query 59. See 1 Sugden on Powers, 134, *et seq.*; Meakings v. Cromwell, 1 Selden, 136; Peter v. Beverly, 10 Pet. 532.

St. Louis, Mo. M. N. SALE.

LEGAL EXTRACTS.

A FAMOUS FRENCH CRIMINAL LAWYER.

M. Lachaud, who exercises a magical influence over juries, was three years ago called upon to defend a girl named Marie Biere, who had shot at her paramour with a revolver and wounded him so dangerously that for weeks he lay at the point of death. Marie Biere was not an artless girl wreaking frantic vengeance on a man who had seduced her, but a person of worthless antecedents, who, having formed a *liaison* with a young gentleman of property, wished to induce him to marry her and shot him because he was going to marry some one else. It ought to have been regarded as an aggravating circumstance in her crime that her paramour had not sought to cast her off penniless, but had liberally settled an income of 144*l.* a year on her for life; and yet it was precisely on this fact that M. Lachaud based his most masterly defense of the girl and obtained her acquittal. He fully admitted how bad Mlle. Biere's antecedents had been; "but," he asked, with his fiery eloquence, "what has that to do with it? If this poor creature conceived a true and tender feeling of love for this man, if she had cherished the dream of becoming his wife and leading a life of purity thenceforth, was it not a most pitiable thing that her hopes of redemption should have been destroyed? You saw how she spurned his money—her love had purified her—he had won her heart and his desertion made her desperate. Are you going now by your verdict to affirm that women who have once fallen shall never be allowed to love, shall never blot out the past, shall be subject all their lives to the degradation of offers such as this by which Marie Biere's lover sought, as he cynically said, to compensate her? Compensation at the rate of 300*f.* a month for a broken heart! Compensation by insult for a wrong most cruel, most worthy of good men's compassion!" There were numbers of fine ladies, actresses, authors — the author of the "Dame aux Camelias" among them — who wept in court during this stirring address; and the bewildered jury brought in a verdict of not guilty, which was hailed with tremendous applause, waving of handkerchiefs and hats. Marie Biere, in leaving the court, received an enthusiastic ovation from the crowd in the Salle des Pas Perdus, and for several days afterward the girl's lodgings were beset by warm-hearted people, who brought her bouquets, cards and more substantial gifts. But her acquittal produced most disastrous consequences. It led, in fact, to a very epidemic of shooting and vitriol throwing. In the course of the last two years, at least twenty girls have been arraigned at the assizes for seeking reparation for their blighted hopes *vi et armis*, and M. Lachaud's famous speech, repeated with every kind of variation suitable to particular circumstances, by barristers great and small, has always led to acquittals. In one of these cases, M. Georges Lachaud, nephew of the great Lachaud, had to meet the remonstrances of the public prosecutor, who plainly pointed out that the constant acquittal of adventuresses who had no object but to bring themselves into notoriety by committing murder, was really a public scandal and a danger to society. "I contend, on the contrary, that such acquittals are tending unmistakably to moralize society," answered M. Georges Lachaud. "By proving that you have no sympathy with young men of loose morals, you are making them cautious. All laws have failed to make them virtuous, but one such verdict as you may render can frighten them into becoming so."—*Cornhill Magazine.*

NOTES.

——In the United States Supreme Court, where gowns are worn and rules of high decorum prevail, it is said that a few days ago there appeared at the bar to argue a Western cause a Kansas lawyer in somewhat primitive garb, and without collar or necktie, though his partner, who was present with him, bearing the briefs, had a representation of necktie consisting of black tape. The clerk politely raised the preliminary objection that it was extremely doubtful whether an attorney without collar or necktie could be allowed to argue before that bench, but the plea of a "throat trouble" procured a dispensation from the rules of etiquette. The throat trouble, however, did not appear to prevent a most vigorous, long and lively argument.—*New York Daily Register.*

——A man dressed in sailor costume was up before a country court the other day upon a charge of stealing a pair of boots. A young lawyer appointed to defend him opened the case with a speech, in which he alluded to his client as "a child of the sad sea waves, a nursling of the storm, whom the pitiless billows had cast, a forlorn and friendless waif, upon the shores of time, after a life spent in fierce and heroic contests with the raging elements." Then the defendant was put in the dock, and the fact was revealed that he was cook upon a canal boat, previous to which he had hawked fish. The "nursling of the storm" is now in jail for six months.

INDEX.

Cases reported in full are cited by the names of the parties. Reference to digested cases are indicated by the abbreviation dig.; to the Current Topics, by C. T.; to the Correspondence by Corresp.; to Queries and Answers, by Q. & A.; and to Notes by n. or note.

ABANDONMENT.
See Homestead.

ACTION.
When action for wrongful issue of attachment accrues, dig. S. C. Kan., 258.

ADMINISTRATION.
Administrator is not subject to garnishment before final order of distribution, dig. S. C. Wis., 278.
Administrator's right of action for trespass upon leasehold property, dig. S. C. Ind., 230.
An administrator of an intestate member of a benevolent association is not entitled to recover the sum which, by contract of the members of the association, is payable upon the death of member to his devisees. Worley v. Northwestern Masonic Aid Association, in full, U. S. C. C., D. Iowa, 154.
Apportionment of rent payable in shares upon the death of a tenant for life, dig. Ky. Ct. App., 218.
Discharge of executor, dig. S. C. Cal., 296.
Discretion of the appointing power in the appointment of administrator, dig. S. C, Pa., 296.
Executor's error of judgment, dig. S. C. Pa., 138.
Investment by executor of funds of estate in mortgage, dig. S. C. Pa., 296.
Powers of executor to sell real estate, Q. & A., 499.
The debts of decedent, a lien upon his lands, dig. S. C. Pa., 57.
Upon the estate of a living person, Q. & A., 419.
Where an executor is empowered to, and does carry on the testator's business, the business assets are not liable for the individual debts of the execution, dig. Eng. Ct. App., 118.
See Equity, Statute of Limitations.

ADMIRALTY.
Claims for pilotage fees are within the jurisdiction of admiralty, dig. U. S. S. C., 57.
Findings of fact under Act Feb, 16, 1875, dig. U. S. S. C., 157.
Limited liability for damages under Federal statute, dig. U. S. S. C., 257.
Maritime lien for supplies will not exist against innocent purchaser for value, unless the supplies were actually furnished, dig. U. S. S. C., 157.
Motion for *certiorari* in an admiralty appeal denied, dig. U. S. S. C., 116.
On petition for limitation of liability, the amount involved with reference to the right of appeal is the aggregate of the claims filed, dig. U. S. S. C., 96.
See Death by Wrongful Acts, Practice.

ADOPTION.
See Parent and Child.

ADULTERY.
"Adultery in Actions for Divorce." Joseph A. Joyce, 162.

ADVERSE POSSESSION.
How affected by ouster of co-tenant, dig. N. Y. Ct. App., 397.

AGENCY.
Agents personal liability where principal's name is not disclosed, dig. U. S. S. C., 157.
Authority of agent, dig. S. C. Mo., 479.
Burden of proof in case of robbery of an agent intrusted with money, dig. S. C. Ohio, 138.
Burden of proof to show breach of duty where money of principal is lost by agent, dig, S. C. Ohio, 258.
Construction of power of attorney. Hunter v. Sacramento Valley Beet Sugar Co., U. S. C. C., D. Col., 352.
Duty of one dealing with an agent to know the limit of the agent's authority, dig. S. C. Ga. 316.
"Execution of Deeds by Agents." Orlando F. Bump, 182.
Individual liability of agent who signs a contract, affixing "agent" to his name, dig. S. C. Minn., 456.
Liability in tort of principal for agent's fraud, dig. S. C. N. J., 36.
Limits of special authority to agent, dig. S. C. Neb. 378.
Possession in the agent necessary to the existence of the factor's lien, dig. S. C. Pa., 477.
Ratification of a borrowing of money by agent, dig. S. C. Col., 498.
"Real Estate Agents." J. M. Kerr, 202.
The double agency of a real estate broker, acting for both parties is only *prima facie* inconsistent, dig. S. C. Ohio, 57.
To pledge the goods of the principle is beyond the scope of the factor's power, and any attempt to do it under color of sale, is tortious and void, dig. S. C. Tex., 57.
What constitutes "effecting a loan" to earn broker's commissions, dig. S. C. N. J., 36.

ALIMONY.
See Divorce.

ALTERATION OF INSTRUMENT.
See Contract.

APPEAL.
Abuse of discretion by the court below, dig. S. C. Cal., 296.
Aggregated values of several claims will not be permitted to make up the necessary amount, dig. U. S. S. C., 477.
Appeal from Federal District to Circuit court, dig. U. S. S. C., 336.
Limitations of writs of error in the Federal Supreme Court, dig. U. S. S. C., 416.
Limits of appellate jurisdiction, dig. S. C. Ohio, 296.
Materiality of error in sustaining demurrer Moores v. Citizens' National Bank, in full, U. S. S. C., 228.
Motion to affirm granted for want of assignment of errors, dig. U. S. S. C., 416.
Order disbarring attorney a final order from which appeal will lie, dig. S. C. Wis., 277.
Parties who are heard merely as a matter of caution, but who have no substantial interest, are not entitled to appeal, dig. U. S. S. C., 438.
Preparation of bill of exceptions, dig. S. C. Ind., 176.

APPEAL—Continued.
"Statement" under the law of Arizona. Head v. Hargrave, in full, U. S. S. C., 388.
The acceptance of security and the signing of a citation is sufficient formality in the allowance of an appeal, dig. U. S. S. C., 477.
What constitutes a final judgment from which an appeal will lie, dig. Tex. Ct. App., 18.
What constitutes error, dig. U. S. S. C., 456.
What is a final judgment from which an appeal will lie, dig. S. C. Tex., Comr. App., 158.

ARMY AND NAVY.
Allowance to officer of traveling expenses, dig. U. S. S. C., 477.
Increase of pay upon retired list, dig. U. S. S. C., 277.

ASSIGNMENT.
Rights of the assignee of non-negotiable paper, dig. S. C. N. C., 237.
See Chattel Mortgage; International Law; War Claims.

ATTACHMENT.
An attachment will be set aside in the absence of any proper endeavor to make personal service upon the respondent, dig. U. S. D. C., S. D. N. Y., 36.
Damages recoverable upon vacation of, dig. N. Y. S. C., 36.
Effect of proceedings in bankruptcy upon, dig. U. S. S. C., 258.
Exemption of United States pension from execution and attachment, dig. S. C. Iowa, 318.
Priorities and equities of attaching creditors *inter sese*, dig. S. C. Kan., 316.
Proof of requisite diligence in service of process to authorize order of publication, dig. N. Y. Supreme Ct., 437.
Rights of third parties under an attachment of a special deposit, dig. N. Y. Supreme Ct., 316.
See Partnership.

ATTORNEY AND CLIENT.
A champertous agreement for the prosecution of a suit is no ground of dismissal. Courtwright v. Burns, in full, U. S. C. C., W. D. Mo., 89.
Attorney's liability for default of his partner, dig. Eng. H. Ct., Ch. Div., 36.
Attorney violating the bankrupt law in attempting to secure a fraudulent preference for a creditor is subject to suspension, dig. S. C. Cal., 96.
Authority of attorney to compromise action. Black v. Rogers, in full, S. C. Mo., 473.
Authority to appear, dig. S. C. Kan., 258.
Clients money received by attorney's agent can not be held for a debt due to the agent from the attorney, dig. Eng. Ct. App., 96.
Collusive suit as ground for disbarring attorney, dig. S. C. Cal., 296.
Communications between solicitor and surveyor or other third party before proceedings commenced or apprehended are not privileged, dig. Eng. Ct. App., 158.
Fraud and deceit of attorney and collusion with opposite party, Q. & A., 98.
"Professional ethics; should a lawyer practice in a court in which the judge is his near kinsman." Jno. F. Hageman, 267.
Purchase by attorney of the subject matter of the litigation, dig. S. C. Kan., 177.
Purchase by attorney of subject matter of litigation, dig. U. S. C. C., D. Col., 36.
Purchase of the property in litigation by the attorney from his client. Rogers v. Marshall, in full, U. S. C. C., D. Col., 168.
Quantum of compensation, dig. S. C. Pa., 18.
Response of Hon. Henry W. Palmer to the toast, "The Bar of the State," at a dinner given to Attorney-General Brewster. 199.
Requisites of record upon proceedings to disbar, dig. S. C. Wis., 277.
The authority of an attorney does not extend to the compromising of suit in execution of which arrangement deeds to lands must be made by his client. Mackey v. Adair, in full, S. C. Pa., 135.
Value of expert testimony in action for compensation for legal services. Head v. Hargrave, in full, U. S. S. C., 388.
What will raise an implied contract to pay a prosecuting attorney for services which are not within his official duty, dig. S. C. Ohio, 116.

BAIL-BOND.
Fears of the accused for his personal safety to excuse his failure to appear, and release his sureties, dig. Ky. Ct. App., 57.

BAILMENTS
"Innkeepers and their liability for the property of their guests." W. W. Ramsay, 206.
Right of the true owner to demand possession of personal property, dig. S. C. Wis., 177.
"Rights and duties of a bailee toward a rival claimant of the goods." F. R. Mechem, 466.

BANKS.
Right of a bank to set-off the note of an insolvent depositor against his account, dig. S. C. Pa., 219.
Right to set-off insolvent depositor's account against his note, Q. & A., 295.
Special deposit not subject to attachment, dig. Supreme Ct. N. Y., 316.
Where funds held in a fiduciary capacity are deposited in bank, what amounts to a notice of the trust, dig. S. C. Ind. 177.

BANKRUPTCY.
Discharge from individual debts will not affect firm liabilities, dig. Ky. Ct. App., 220, 259.
Duties of assignees towards secured creditors, dig. U. S. S. C., 116.
Effect of proceedings upon attachment, dig. U. S. S. C., 258.
Impeachment of discharge, dig. S. C. Tex., 286.
Interpretation of the act as to "set-offs and credits," dig. U. S. S. C., 357.
Jurisdiction of State court where property has been attached, dig. U. S. S. C., 437.
Rights of attaching creditors, dig. U. S. S. C., 277.
See Service of Process.

BAR ASSOCIATIONS.
State Bar Association of Kentucky, note 280.

BASTARDY.
Legitimacy of the children of slaves, Q. & A., 20.
Presumption of the legitimacy of a child born in wedlock, dig. S. C. Iowa, 335.

BILLS AND NOTES.
See Negotiable Paper.

BILL OF LADING.
Issued by agent without authority in hands of innocent holder for value. Pollard v. Vinton, in full, U. S. S. C., 37.

BOND.
Given for a frivolous appeal to a court which has no jurisdiction is not void for want of consideration, dig. Ky. Ct. App., 138.
Innocent alteration made without fraudulent intent will not render it void, dig. S. C. Cal., 36.
Requisite contents of the bond of an internal revenue collector, dig. U. S. S. C., 96.
See Estoppel.

BOOK REVIEWS.
Abbott's Trial Evidence, 459.
American Decisions, Vols. 30 and 31. By A. C. Freeman, 99.
American Decisions, Vol. 32. By A. C. Freeman, 275.
American Criminal Reports, Vol. 3. By John G. Hawley, 299.
American Law Digest and Legal Directory, 339.
American Reports, Vol. 37. By Irving Browne, 320.
Bradwell's Reports, Vol. 9, 180.
Compensation for Legal Services. By Edwin Countryman, 199.
Flippin's United States Supreme Court Reports, 260.
Hubbell's Legal Directory, 1881-2, 359.
Index-Digest of the American Reports. By Irving Browne, 419.
Insurance Digest. By Hine and Nichols, 440.
Jacob's Fisher's Digest, Vol. 8, 180.
New Jersey Equity Reports. By John H. Stewart, Reporter, 99.
Practice and Precedents. By A. V. D. Honeyman, 220.
Real Estate Agency. By Nathan T. Fitch, 100.
Report of First Annual Meeting of the Missouri Bar Association, 420.
Star Chamber Cases. Reprinted, 339.
The Reporters By John William Wallace, 480.
The Students' Guide to Williams on Real Property, 459.
The Students' Guide to Williams on Personal Property, 459.
The Students' Guide to Smith on Contracts, 459.
Tyler on Infancy and Coverture, 440.
Voter's Hand-Book. By Sherman Spencer, 100.

BREACH OF PROMISE OF MARRIAGE.
See Seduction.

CHARITY.
Right of charitable institutions to recover for charity bestowed, dig. Ky. Ct. App., 258.

CHATTEL MORTGAGE.
A chattel mortgage on a stock of goods which provides that the mortgagor may retain possession and dispose of goods in the course of business is not presumptively fraudulent, dig. S. C. Ind. 158.
Does chattel mortgage of mare give a lien upon a foal born afterwards, Q. & A., 320, 339.
Effect of the taking possession by the mortgagee to secure his debt upon subsequent attaching creditors, dig. S. C. Mo., 194.
Effect of the withholding of the mortgage from record upon the rights of a creditor purchasing with notice. Wilson v. Milligan, in full, S. C. Mo., 231.
Must be assigned in writing to enable assignee to maintain replevin in his own name, dig. S. C. Me. 416.
Of property bought on credit. Rights of *bona fide* purchasers, Q. & A., 39; Id. 58.
Priorities under unrecorded chattel mortgage, Q. & A., 499.
Uncertainty in the description of property. Muir v. Blake, in full, S. C. Iowa, 314.
What amounts to a breach of condition not to sell, dig. S. C. Mich., 417.

COLLATERAL SECURITY.
Indorsement of note as collateral security is due course of business and the indorser is an innocent holder for value. Straughan v. Fairchild, in full, S. C. Ind., 413.

COMMON CARRIERS.
"Bills of lading." Adelbert Hamilton, 22.
Construction of "live stock contract" limiting liability. Bryant v. Southwestern R. Co., in full, S. C. Ga., 373.
"Contracts of Carriers of Goods." *Irish Law Times*, 482.
Liability of telegraph company for mistake in message, notwithstanding regulation that it should be "repeated." Western Union Tel. Co. v. Blanchard, in full, S. C. Ga., 331.
Limited railway tickets again. C. T., 481.
Railway tickets limited as to time. C. T., 461.
Reasonableness of the regulation requiring passengers stopping at intermediate points to procure stop over checks, dig. S. C. Wis., 177.
"Repetition of Telegraphic Messages." A. G. McKean, 386.
The express business is a public necessity and the court will restrain the railroad companies from discrimination against it. Southern Exp. Co. v. St. Louis, etc. R. Co., in full, U. S. C. C., E. D. Mo., 173.
The express companies and the railroads. C. T., 121
See Negligence.

COMPUTATION OF TIME.
When courts will take cognizance of a fraction of a day. Town of Louisville v. Portsmouth Savings Bank, in full, U. S. S. C., 108

CONFLICT OF LAW.
"Proof of foreign law." Henry Wade Rogers, 125.

CONSTITUTIONAL LAW.
A State can not be sued in her own courts, neither directly nor by proceeding against the officer having custody of the moneys sought to be reached, dig. Ky. Ct. App., 36.
A State tax on telegraphic messages to points without the State is void as being regulation of inter-State commerce, or upon government messages as being a burden upon a Federal agency. Western Union Tel. Co. v. Texas, in full, U. S. S. C., 448.
Claims against the State, dig. S. C. N. C., 237.
Collection of repudiated State bonds. C. T., 361.
Concurrent State and Federal jurisdiction of crime. Dashing v. State, in full, S. C. Ind., 351.
Repugnance of statute to Constitution must be plain, dig. S. C. Pa., 237.
Sec. 10, art. 1, of the Iowa Constitution, providing that in criminal prosecutions, and cases involving life or liberty, the accused shall be entitled to a speedy and public trial by an impartial jury, does not apply to an inquest of lunacy before commissioners under the statute, dig. S. C. Iowa, 37.
Sunday law constitution as being within the police power, dig. S. C. Cal., 397.

CONSTITUTIONAL LAW—Continued.
Taxation by State of debt of another State, dig. U. S. S. C., 197.
The title of the act of the legislature of March 9, 1881, which is as follows: "An act to amend sec. 1547 of art. 8, of the Revised Statutes, relating to offenses against public morals and decency, or the public, police and miscellaneous offenses," is sufficient, under sec. 28, art. IV, of the Constitution, which declares that "no bill * * * shall contain more than one subject, which shall be clearly expressed in the title." State *ex rel.* v. Laughlin, in full, S. C. Mo., 454.
Where of two provisions contained in a statute, one is constitutional and one is not, the rule is that if they are distinct from each other and capable of separate enforcement, the sound one is to stand and the unconstitutional one to fall. Otherwise, if they are mutually interdependent in their character so that one can not be enforced without the other Powell v. State, in full, S. C. Ala., 134.

CONTEMPT.
Jurisdiction of a justice of the peace in, dig. S. C. N. J., 37.
Resignation of public officer to avoid obedience to *mandamus*. Watts v. Lauderdale County, in full, U. S. C. C., W. D., Tenn., 210.
What disobedience of a judicial mandate amounts to contempt, dig. S. C. N. C., 237.

CONTINUANCE.
Admission that absent witness would testify to facts set out. State v. Underwood, in full, S. S. Mo., 395.

CONTRACT.
Acceptance of note in accord and satisfaction, dig. S. C. Pa., 416.
Accord and satisfaction by acceptance of less than demand. C. T., 401, 461.
A charge by a cotton compressing company of a greater sum for storing compressed than other cotton, not illegal as against public policy, dig. S. C. Tex., 218.
A contract for the transmission of a telegraphic message made on Sunday is void. Rogers v. Western Union Tel. Co., in full, S. C. Ind., 174.
A debtor is entitled to receive back his collateral from the assignee of the lender before payment of the debt can be exacted, dig. S. C. Pa., 177.
Agreement not to take the benefit of bankrupt law as a consideration, dig. S. C. Ga., 237.
A mortgage given by a mother for the purpose of stopping a prosecution against her son, who was indicted, is void, dig. S. C. Pa., 96.
Antecedent indebtedness as a consideration, dig. S. C. Neb., 336.
A rescission for fraud must be *in toto*, dig. S. C. Mo., 477.
A surety upon a note being discharged in consequence of an alteration in it: *Held*, that he could not be made liable in *assumpsit* upon the allegation that the money was loaned to the maker upon the special instance and request of the surety, dig, Ky. Ct. App., 96.
Bankrupt's new promise to pay a debt, dig. Ky. Ct. App., 397.
"Bills of lading." Adelbert Hamilton, 22.
Breach of bond to deliver property and subsequent tender, dig. S. C. Iowa, 316.
"Collateral Securities." Chas. B. Elliott, 462.
Composition agreements. C. T., 281, 321.
Composition agreements. Bank of Commerce v. Hoeber, in full, St. Louis Ct. App., 293.
"Composition agreements—Bank v. Hoeber, again." A. G. Scott, 325.
Compromise of action enforcible at law, dig. S. C. Col., 408.
Consideration of note given to cover forgeries, dig. Eng. Ct. App., 238.
Construction of contract payable in Confederate money, dig. U. S. S. C., 316.
Construction of contract providing for removal of timber within limited time, dig. S. C. Mo., 218.
Construction of contract to abstain from business, dig. S. C. Ind., 297.
Construction of contradictory note. Q. & A., 276.
Construction of note payable in labor, dig. S. C. Ind., 357.
"Defrauded vendors of chattels." James P. Oliver, 442.
Distinction between covenant and condition, Hale v. Finch, in full, U. S. S. C., 9.
Distinction between mortgage and conditional sale, dig. S. C. Kan., 177.
"Duty of mutual disclosure." Charles B. Elliott, 26

CONTRACT—Continued.

Enforcing specific performance by assignee, dig. S. C. Me., 477.

Effect of satisfaction of the mortgage upon a verbal gift of accrued interest upon it, dig. S. C. Mich., 416.

Effect of secret bonus to creditor. Bank of Commerce v. Hoeber, in full, St. Louis Ct. App., 296.

Effect of a tender, dig. S. C. Me., 456.

Facts construed into a contracting for surgical attention, dig. Ky. Ct. App., 297.

Failure of subject matter, dig. S. C. Ohio, 398.

Fraudulent representations of agent, dig. S. C. Neb., 376.

"Gifts *Causa Mortis*." Henry Wade Rogers, 362.

Grounds for setting aside auction sales, dig. U. S. S. C., 158.

Impersonation of another amounting to forgery, dig. Eng. High Ct., Ch. Div., 57.

Implied warranty of manufacturer selling goods, not his own make, dig. Eng. Ct. App., 258.

Inadequacy of consideration as a ground for refusing to enforce a contract. Caplice v. Kelly, in full, S. C. Kan., 255.

Innocent alterations made in a bond without fraudulent intent will not render it void, dig. S. C. Cal., 36.

In restraint of trade, Q. & A., 458.

Measure of damages for breach of contract, dig. S. C. Ga., 194.

Modification and alteration of instruments under seal, dig. S. C. Pa., 158.

Mortgagee's right of action against one assuming a mortgage, dig. S. C. Ind., 335.

No affirmative defense can be maintained upon a deed which has been fraudulently altered, by the party who made the alteration. But one who purchases in good faith from such grantee, without knowledge of the alteration of the deed, and acting upon representations of the grantor in the deed, obtains a good title. Robbins v. Magee, in full, S. C. Ind., 129.

Notice of intended breach is not of itself a breach, dig. S. C. Pa., 258.

Not to oppose discharge in bankruptcy void on public policy, dig. S. C. Me., 477.

Practical construction of executory arrangements, dig. S. C. Mich., 416.

Pre-existing indebtedness as a consideration, dig. S. C. Kan., 258.

Reasonable construction of contract to finish work within certain time where completion is hindered by fault of the opposite party, dig. S. C. Wis., 177.

"Repetition of telegraphic messages." A. G. McKean, 386.

Representations contained in the advertisement of "money on easy terms," dig. Eng. High Ct., Ch. Div., 437.

Right of action upon agreement for benefit of third party, dig. S. C. Pa., 57.

Right of charitable institutions to recover for a gratuity bestowed, dig. Ky. Ct. App., 358.

Promise to pay a debt which has been voluntarily released, dig. Md. Ct. App., 397.

"Sale of goods by parties lacking title." James P. Oliver, 146.

Sexual intercourse is an immoral consideration, dig S. C. Ill., 397.

Threat of criminal proceedings against another to amount to duress, dig. Eng. High Ct., Q. B. Div., 96.

The purchaser of the good-will of a business from trustee in bankruptcy has no right to restrain the bankrupt from commencing business afresh and soliciting former customers, dig. Eng. Ct. App., 159.

"The right of stoppage in transitu." Charles B. Elliot, 242.

What amounts to a material alteration of a writing. Craighead v. McCloney, in full, S. C. Pa., 192.

What amounts to an instrument under seal, dig. S. C. Ga., 317.

What amounts to a novation of a contract, dig. S. Ga., 196.

What amounts to the ratification of a compromise, dig. S. C. Wis., 96.

What amounts to "undue influence" and an "unsound mind" to invalidate a deed, dig. S. C. Pa., 139.

Where the contract between a benevolent aid association and its individual members is for the payment, upon the death of a member, of a sum of money to his devisees, and such member dies intestate, the administrator is not entitled to recover such amount from the association. Worley v. Northwestern Masonic Aid Association, dig. U. S. C. C., D. Iowa, 154.

Void as being in aid of rebellion, dig. U. S. S.C., 195.

CONTRACT—Continued.

See Common Carrier, Fraudulent Conveyance, Gift, Married Woman, Master and Servant.

CONVEYANCE.

A description of the property covered by a railroad mortgage as, "All the present and in future to be acquired property of" the railroad company, "that is to say," with a detailed description following, will not be held to include county bonds, not enumerated in the list, which had been previously granted to aid in its construction, dig. U. S. S. C., 96.

Adoption of signature by acknowledgment and delivery of deed, dig. S. C. Me., 498.

Consideration of conveyance between husband and wife, dig. S. C. Wis. 237.

Deed by trustee, how signed, dig. S. C. Ga., 195.

The delivery of a deed, placed in the hands of a third party, to be delivered only upon compliance with a condition, wrongfully delivered before the condition is complied with is nugatory. Robins v. Magee, in full, S. C. Ind., 129.

Delivery upon certain condition not necessarily an escrow. Q. & A., 378.

Distinction between mortgage and conditional sale, dig. S. C. Kan., 177.

Effect of quit claim deed as against a prior unrecorded deed. Fox v. Hall, in full, S. C. Mo., 31.

"Execution of deed by agents." Orlando F. Bumb, 182.

Grantees by quit claim and registration laws. C. T., 41.

"Notice of unrecorded deed to subsequent purchaser or attaching creditor." Wm. L. Murfree, Jr., L., 122; II., 142.

Quantity is a material element of the contract in conveyance of land, dig. N. Y. Ct. App., 397.

Representations of the grantor as to what the records will show, dig. Ky. Ct. App., 57.

Sufficiency of unacknowledged and unrecorded deed to pass title, dig. S. C. Neb., 18.

Validity of conditional limitation restraining the alienation of a life estate, dig. S. C. App. Va., 138.

What amounts to a delivery in escrow, dig. S. C. Ind., 297.

What amounts to a delivery of a deed, dig., S. C. Ill., 398.

What amounts to a delivery, Q. & A., 97.

Where the granting clause or premises in a deed of land in terms conveys the whole title of the grantor, and a subsequent clause declares that he intends to convey only an undivided half thereof, *held*, that the first or granting clause controls, and the whole title passes by the deed. Green Bay, etc. Canal Co. v. Hewitt, in full, S. C. Wis., 475.

See Chattel Mortgage.

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Evidence of compliance with the statute, dig. U. S. S. C., 437.

CORPORATION.

A company may issue full paid stock in payment for any property which it is authorized by its charter to purchase, and in the absence of fraud the law will regard this as full paid stock. Brant v. Ehlen, in full, Md. Ct. App., 449.

An attachment of the stock of a shareholder is not an incumbrance upon the corporation, dig. U. S. S. C., 458.

A stockholder is not liable for an assessment upon his stock made by order of court in proceedings to which he is not made a party, dig. S. C. Ill., 117.

A stockholder's liability is that of a principal and not that of surety for the principal. Sonoma Valley Bank v. Hill, in full, S. C. Cal., 32.

A transfer of stock induced by the fraudulent process of "freezing out" is not void, dig. U. S. C. C., S. D. N. Y., 437.

Borrowing money not *ultra vires* for a railroad company, dig. S. C. Pa., 397.

Checks drawn by a subordinate officer in manner accustomed, dig. U. S. S. C., 19.

Extra-territorial force of the laws of the State of its creation, dig. U. S. C. C., D. La., 297.

"Income" of capital stock. C. T., 241.

"Income" of capital stock. Biddle's Appeal, in full, S. C. Pa., 252.

"Income" of capital stock. Vinton's Appeal, in full S. C. Pa., 273.

"Income" of capital stock. Millen v. Guerrard, in full, S. C. Ga., 214.

CORPORATION—Continued.
It is *ultra vires* for a railroad company to guarantee the success of a musical festival, or for a manufacturing corporation to guarantee the success of an enterprise that may be expected to increase the demand for its goods. Davis v. Old Col. R. Co., in full, S. J. C. Mass., 69.
Liability of corporation for malicious prosecution. C. T., 401.
Liability of officers in personal capacity, dig. U. S. S. C., 278.
Liability of stockholders for labor debts, dig. S. C. Mich., 378.
Liable for malicious prosecution, dig. S. C. Mo., 456.
Notice to corporation to bind the pledgee of stock, dig. S. C. Kan., 179.
Partially paid stock in the hands of an innocent holder for value. Brant v. Ehlen, in full, Md. Ct. App., 449.
Powers granted by special act of incorporation not repealed by general law, dig. S. C. Wis., 160.
Railroads and the public. C. T., 341.
Rights and liabilities of the holders of unauthorized stock. Scovill v. Thayer, in full, U. S. S. C., 307.
Right to borrow money, dig. S. C. Pa., 237.
Service of process upon foreign corporations by compliance with the statute will have the same effect upon such corporations that personal service has as to individuals. McNichol v. United States Mercantile Agency, in full, S. C. Mo., 51.
Shareholders right of action for depreciation of stock by directors. Hawes v. Contra Costa Water Co., in full, U. S. S. C., 288.
Stockholder's liability can not be avoided by assignment, dig. S. C. Pa., 317.
Stockholder's right to assert corporate claim, dig. U. S. S. C., 416.
What is "income" of capital stock. Millen v. Guerrard, in full, S. C. Ga., 214.
What will constitute a paper the note of a corporation, dig. S. C. Ind., 239.
When power to borrow is exhausted a colorable sale, which is really a borrowing, is *ultra vires* and void, dig. Eng. Ct., Ch. Div., 195.
Where a creditor's bill was pending against a National bank, and an act of Congress was passed, *pendente lite*, authorizing the court to enforce the stockholder's liability for corporate debts in such proceedings, and a supplemental bill making the stockholders parties was filed for the purpose of enforcing such liabilities: *Held*, 1. That the individual liability of the shareholders could be enforced in such proceedings in equity; and 2, that the pendency of such proceedings will operate as a bar to an action at law to enforce the same individual liability. Harvey v. Lord, in full, U. S. S. C., N. D. Ill., 230.
Undisposed of real estate upon dissolution. Q. & A., 137.
See Garnishment; Removal of Causes.

COSTS.
Costs in the administration of a trust fund. C. T., 441.
Costs of the administration of a trust fund. Trustees, etc. v. Greenough, in full, U. S. S. C., 469.
No imprisonment for costs after fine is paid, dig. Ky. Ct. App., 498.

COVENANTS.
See Contracts.

CRIMINAL LAW.
Allegation of guilty knowledge in indictment for passing counterfeit bonds. C. T., 361.
Amendment of verified complaint, dig. S. C. Kan., 127.
A new trial will not be awarded in a criminal case because of an erroneous statement of testimony to the jury by counsel. People v. Barnhart, in full, S. C. Cal., 95.
A prisoner during the trial fled the jurisdiction, whence it was necessary to discharge the jury, *held*, that he was never in jeopardy, dig. S. C. Cal., 138.
Burden of proof where insanity is defense, dig., N. Y. Ct. App., 398.
Caption and asportation essential to larceny. Edmonds v. State, in full, S. C. Ala., 193.
Concurrent State and Federal jurisdiction. Dashing v. State, in full, S. C. Ind., 351.
Confession of accomplice as evidence, dig. S. C. Ga., 238.
Corroboration of evidence of accomplice, dig. Tex. Ct. App., 317.
Deception necessary to constitute the crime of swindling, dig. Tex. Ct. App., 158.
Discrepancy between the legal and medical views of Insanity when pleaded as a defense in homicide cases. C. T., 21.

CRIMINAL LAW—Continued.
Dying declarations to exonerate the accused, Q. & A., 38, 118.
English punishment for regicides. C. T., 241.
Erroneous instructions as to murder in first degree, dig. S. C. Mo., 437.
"Evidence by prisoners — Guiteau's trial.—*London Times*, 7.
Evidence of defendant in criminal cases, dig. S. C. Iowa, 317.
Evidence of self-defense under indictment for assault with intent to kill, dig. S. C. Ohio, 258.
Evidence of threats by accomplice under indictment for murder, dig. S. C. Iowa, 317.
Expert evidence in rape cases, dig. S. C. Wis., 457.
Facts amounting to murder in the first degree, dig. S C. Pa., 158.
Facts reducing the offense from murder to manslaughter, dig. Tex. Ct. App., 237.
Granting continuance to enable defendant to prepare for trial, dig. S. C. Mo., 195.
"Insanity and crime." *Law Times*, 459.
"Insanity as a defense.—The Lamsen Case." *New York Daily Register*, 300.
"Insanity—Burden of proof." By Henry Wade Rogers, 2.
Intoxication as affecting premeditation. Hopt v. People, in full, U. S. S. C., 269.
Judgment for costs against prosecuting witness, dig. S. C. Ill., 118.
Jurisdiction of embezzlement by travelling collector. Corresp., 59.
Killing a trespassing pig by a blow from a stick is not the infliction of "needless pain" within the law against cruelty to animals, dig. S. C. Ark., 116.
Larceny of lost goods by finder, dig. Tex. Ct. App., 195.
Larceny of lost property. C. T., 181.
Larceny of pledge by pledgor, dig. S. C. Iowa, 317.
"Law and outlaw." *New York Daily Register*, 340.
Necessary averments in an indictment for slander, dig. S. C. N. C., 237.
Neglect to supply medical attendance to constitute manslaughter. C. T., 421.
No adverse presumption from failure to call accomplice, dig. S. C. Iowa, 457.
No person shall be twice put in jeopardy for the same act or omission whether the offense be the same *eo nomine* or not, dig. Tex. Ct. App., 57.
Period during which an escaped convict is at large is not to be regarded as a part of his term of imprisonment, dig. S. C. N. J., 96.
Plea of self defense by a defendant taken in the act of adultery, dig. Tex. Ct. App., 298.
"Police officers inducing the commission of crimes." *Irish Law Times*, 67.
Presumptions arising from the possession of property shown to be recently stolen, dig. Tex. Ct. App. and S. C. Iowa, 19.
Recent possession of stolen property as evidence of theft, dig. S. C. Iowa and Tex. Ct. App., 317.
Requisite contents of indictment for keeping gaming house, and for renting a house for gaming purposes, dig. S. C. Ga., 195.
Right of the defendant to be present at the rendition of the verdict, dig. S. C. Ga., 116.
"Right of the prosecution to stand jurors aside." Edwin G. Merriam, 402.
Sergeant Mason's Case and the New Jersey Legislature. *New Jersey Law Journal*, 300.
Setting out forged instrument in indictment for forgery, dig. S. C. Ind., 237.
Sufficiency of evidence to sustain a verdict, dig. S. C. Ill., 116.
The counsel of the defendant in a prosecution for felony have no power to waive tacitly or otherwise his right to be present, when additional instructions asked by the jury are given. Shipp v. State, in full, S. C. Tex., 94.
The court has no right to direct a verdict even where guilt or innocence depends upon a question of law, dig. U. S. C. C., D. Kan., 437.
"The genesis of perjury." *London Times*, 106.
To what extent corroboration of the evidence of an accomplice is necessary, dig. S. C. Iowa, 37.
Waiver of objection to juror in criminal case, dig. S. C. Kan., 336.
Weight of evidence under an indictment for rape, dig. S. C. Ga., 237.
Wilfully causing a panic in a theater, dig. Eng. High Ct., Cr. Cr. Res., 19.

CRIMINAL LAW—Continued.
What amounts to false pretenses, dig. Eng. High Ct., Cr. Cas. Res., 317.
When threatened prosecution is within statute against blackmail, dig. S. C. Ind., 278.
When will burning a barn amount to arson, dig. S. C. Pa., 57.

CURTESY.
Curtesy in wife's separate estate. dig. S. C. Mo., 398.
"Estates by curtesy." Wm. L. Murfree, Jr., 382.

DAMAGES.
Claims against the State for negligence of its officers. dig. S. C. N. C., 237.
Distinction between liquidated damages and penalty, dig. S. C. Kan., 398.
Elements of damages for injuries to the person and personal property, dig. S. C. Ga., 278.
Elements of damages for personal injuries, dig. S. C. Wis., 177.
Evidence of limited financial condition of defendant to mitigate damages for seduction, dig. S. C. Ind., 437.
In action for damages for keeping fierce dog, evidence of *scienter* is necessary, dig. Md. Ct. App., 477.
Injuries to live stock by railroad trains, dig. S. C. Mo., 195.
"Injuries to parental feelings." By A. J. Donner, 222.
Liability of recorder in damages for defective search, dig. S. C. N. C., 239.
Loss of time of a married woman not engaged in separate business, not an element of damages in her action for personal injuries, dig. S. C. Iowa, 37.
Malus animus to aggravate damages for malicious prosecution, dig. S. C. Pa., 457.
Measure of damages for breach of contract, dig. S. C. Ga., 194.
Measure of damages for breach of contract of sale, dig. Eng. High Ct., Q. B. Div., 498.
Measure of damages for breach of contract, dig. S. C. Mich., 379.
Measure of damages in action on replevin bond, dig. S. C. Neb., 380.
Measure of damages for the detention of a certificate of deposit, dig. U. S. C. C., D. of Oregon. 238.
Measure of damages for the obstruction of mill stream, dig. S. C. Pa., 158.
Measure of damages for violation of riparian rights, dig. S. C. Pa., 218.
Proximate and remote causes for injury. C. T., 101.
Remoteness of damages in action for malicious prosecution, dig. S. C. Iowa, 457.
Remoteness of damages for negligence. C. T., 321.
"The latest views of injuries to infants." James P. Oliver, 282.
The prosecution of a civil suit is no ground for damages, dig. S. C. Tex., Comrs. App., 80.
See Seduction; Set-Off; Municipal Corporation.

DEATH BY WRONGFUL ACT.
Jurisdiction of the United States District Court as an admiralty court to try the liability of a vessel for damages for the death of persons killed in a collision, dig. U. S. S. C., 57.

DEED.
Construction of description, dig. N. Y, Ct. App., 297.
What amounts to a covenant of warranty in a deed, dig. S. C. Tex., 218.

DEED OF TRUST.
Trustees sale may be controlled by court of equity, dig. U. S. S. C., 359.
See Conveyances.

DEMURRER.
See Pleading.

DESCENTS AND DISTRIBUTIONS.
In pursuance of an order made in a partition suit, land of an infant was sold. The infant died, leaving J his heir. J died intestate. *Held*, that the proceeds of the sale belonged to the administrator, and not to the heir of J, dig. Eng. High Ct., Ch. Div., 117.

DIGESTING AND INDEXING.
Correspondence, 186.
"System in digests." *New York Daily Register*, 160.
Uniformity in. C. T., 61, 201.

DIES NON JURIDICUS.
See Sunday.

DISCRETION.
"Limiting the time of argument of counsel." A. G. McKean, 45.

DIVORCE.
"Adultery in actions for divorce." Joseph A. Joyce, 162.
An agreement to live apart exacted from the wife by the husband amounts to desertion by him, dig. Eng. High Ct., Prob. Div. & Adm. Div., 297.
The communication of a venereal disease to the wife is extreme cruelty and in some cases will justify a divorce, dig. S. C. Mich., 117.
Custody of non-resident minors in a divorce case. C. T., 261.
Lands in fee as alimony, dig. S. C. Ill., 398.
Modification of decree giving an annuity for life as alimony, dig. S. C. Me., 498.
Quantum of alimony, dig. S. C. Ind., 238.

DOWER.
"Conveyance in fraud of dower." Seymour D. Thompson, 102.
Where the widow joins the heir at law in a mortgage for the purpose of releasing dower, and the mortgage is afterwards paid off, the right of dower revives, dig. Eng. High Ct., Q. B. Div., 117.

EASEMENTS.
The rules concerning dominant and servient estates applicable to subteranean rights of way, dig. S. C. Ohio, 218.

ELECTION.
Irregularities in the conduct of not affecting the result will not justify the rejection of the precinct, dig. S. C. Ill., 19.

EMINENT DOMAIN.
Condemnation of mortgaged land, dig. U. S. S. C., 96.

EQUITY.
Issues of fact in equity in Federal courts, dig. U. S. C. C., E. D. N. Y., 159.
In granting relief on the ground of mistake equity will restore the parties to their former condition, where it can be done without interfering with intervening rights, dig. Ky. Ct. App., 57.
Inadequacy of consideration as a defense to the specific performance of contracts, dig. S. C. Mich., 139.
Marshalling the assets of a corporation, dig. S. C. Ill., 297.
Marshalling of assets. Q. & A., 338.
May control trustee's sale under deed of trust, dig. U. S. S. C., 359.
Perfecting deed by adding seal, inadvertently left off dig. S, C. Me., 478.
Proof of notice of unrecorded mortgage, dig. Md. Ct. App., 478.
Right to the discovery of books of the firm in partnership accounting, dig. Superior Ct. N. Y., 259.
Relief from mistake in fact, dig. S. C. Iowa, 457.
Submission of a sketch of master's report to parties for argument, dig, U. S. C. C., D. Ind., 139.
The doctrine of marshalling of assets has no application where both funds are not in hands of a common debtor, dig. S. C. Pa., 218.
The issue of want of consideration, in an action upon a note, where the facts are such that it can only be determined after the taking of a partnership accounting, is properly within the jurisdiction of equity, to be reached by special bill, and can not be set up as a defense in an action at law. Courtwright v. Burns, in full, U. S. C. C., W. D. Mo., 89.
The power to regulate the compensation to be paid to railroad companies by express companies. Southern Exp. Co. v, St. Louis, etc. R. Co., in full, U. S. C. C., E. D. Mo., 173.
Title of land purchased with funds of the estate in name of executrix, dig. S. C. Mich., 379.
Weight in evidence of denials in answer, dig. U. S. S. C., 278.
When equity will grant relief against judgment by default, dig. U. S. S. C., 158.
See Jurisdiction.

EQUITY PRACTICE.
Default must be ascertained before suit can be brought upon bond of receiver, dig. S. C. N. C., 239.

ESCROW.
What amounts to a delivery in escrow, dig. S. C. Ind., 297.

ESTATES.
Conveyance of life estate with contingent remainder, Q. & A., 240.
"Estates by curtesy." Wm. L. Murfree, Jr., 382.

ESTOPPEL.
An answer which attempts to plead an estoppel by conduct must show that the defendant relied upon

ESTOPPEL—Continued.
the plaintiff's representations or conduct, was influenced thereby, and was ignorant of the truth. In pleading an estoppel, the facts must be stated with fullness and certainty. Robbins v. Magee, in full, S. C. Ind., 129.
In an action against the maker of a promissory note given as the consideration of a conveyance received for the purpose of aiding the grantor to delay his creditors, the fraud can not be set up in defense. Butler v. Moore, in full, S. C. Me., 452.
Married woman not estopped by the covenants of husband's conveyance in which she joins, dig. S. C. Iowa, 37.
Of one who stands by and sees improvements erected on his land by one who claims title, dig. S. C. Mo., 195.
Recital of the performance of conditions precedent in municipal bonds, dig. U. S. S. C., 438.
Recitals in guardians bond to estop surety, dig. S. C. Ind. 498.

EVIDENCE.
An admission in a lease is not inadmissibte in evidence on the ground that it was made under the pressure of a pending injunction, dig. S. C. Minn., 80.
Admissions of partners to prove partnership, dig. S. C. Ga., 218.
Admissions to prove divorce where marriage is in issue, dig. S. C. Pa., 357.
Admissions of secondary evidence to supply writing, dig. S. C. Kan., 258.
A warehouse receipt being a contract rather than a mere receipt is within rule that parol evidence of contemporaneous conversations is not admissible to vary its terms. Stewart v. Phœnix Ins. Co., in full, S. C. Tenn., 432.
Burden of proof of malice and probable cause in action for malicious prosecution against municipal a thorities, dig. 80.
Character of impeaching testimony, dig. S. C. Ga., 238.
Competency as to transactions with a deceased party. Craighead v. McLoney, in full, S. C. Pa., 192.
Competency of executor as to his own claim, dig. Md. Ct. App., 478.
Competency of, as to transactions with deceased persons, dig. S. C. Ill., 398.
Competency of the evidence of a deceased witness, dig. S. C. Ga., 218.
Competency of wife, in the husband's interest, dig. S. C. Ill., 298.
Competency of wife for husband in cases in which she has acted as agent, dig. S. C. Mo., 439.
Confession of accomplice, dig. S. O. Ga., 238.
Contemporaneous written agreement on the same matter, to be taken together and construed as one instrument, dig. S. C. Wis., 19.
Corroboration of evidence of accomplice, dig. Tex. Ct. App., 317.
Courts will take judicial notice of the navigability of large rivers. Wood v. Fowler, in full, S. C. Kan., 114.
"Evidence by Prisoner—Guiteau's Trial." *London Times*, 7.
Evidence of threats by accomplice under indictment for murder, dig. S. C. Iowa, 317.
Expert evidence under indictment for rape, dig. S. C. Wis., 457.
Framing hypothetical questions for expert witnesses dig. N. Y. Ct. App., 158.
Incompetency of witness from lack of religious belief, dig. Ky. Ct. App., 398.
In confession, the whole conversation is admissible. State v. Underwood, in full, S. C. Mo., 395.
"Insanity—burden of proof." By Henry Wade Rogers, 2.
Judicial presumption as to the meaning of the initials "C. O. D.," dig. S. C. Me., 457.
Leading questions in the direct examination of the witness, dig. Tex. Ct. App., 238.
Lex loci rei sitae controls in the question of the admissibility of a deed of land located in another State, dig. U. S. S. C., 437.
Limits of cross-examination, dig. S. C. Iowa, 457.
Limits of the rule admitting evidence of the statements and admissions of parties, dig. S. C. Tex., 258.
No adverse presumption in criminal case from failure to call accomplice, dig. S. C. Iowa, 457.
Offer of compromise not a tender and consequently not an admission of indebtedness, dig. S. C. Kan., 177.
Of defendant in criminal cases, dig. S. C. Iowa, 317.
Of domicile to effect the homestead, dig. S. C. Tex., 218.
Of mental unsoundness dig. S. C. Iowa, 318.

EVIDENCE—Continued.
Of "opposite party" as to transaction with person deceased, dig. S. C. Ind., 336.
Of wife against husband in criminal case. Q. & A., 378.
Parol contemporaneous agreement of payee of a note that the wife should not be called on to pay a note made with her husband inadmissible, dig., N. J. Ct. Err., 37.
Parol evidence may be heard as to an independent collateral agreement, or where there has been a parol agreement and a part only has been reduced to writing, the whole contract may be proven, but in neither case is the writing to be contradicted. Stewart v. Phœnix Ins. Co., in full, S. C. Tenn., 432.
Parol evidence will not be received in a suit upon a note to show a contemporaneous repugnant contract. Courtwright v. Burns, in full, U. S. C. C., W. D. Mo., 89.
Presumptions arising from the possession of property shown to have been recently stolen, dig. Tex. Ct. App. and S. C. Iowa, 19.
Presumption of the legitimacy of child born in lawful wedlock, dig. S. C. Iowa, 335.
"Presumptions of life, death and survivorship." *Irish Law Times*. I, 286; II, 302; III, 322; IV, 345; V, 367,
Presumption of payment from the lapse of time, dig. S. C. Pa., 248.
Presumption of payment from lapse of time, dig. S. C. Pa., 457.
Proof of execution of lost instrument purporting to have been signed by defendant, dig. S. C. Ind., 418.
"Proof of foreign law." Henry Wade Rogers, 125.
Recent possession of stolen property as evidence of theft, dig. S. C, Iowa and Tex. Ct. App., 317.
The maxim *falsus in uno*, etc., is to be applied only where the witness knowingly gives false testimony, dig. S. C. Cal., 19.
To show a deed absolute on its face to be a mortgage, dig. S. C. Pa., 195.
"Telegrams as evidence." Jas. A. Seddon, 262.
"Use of memoranda to refresh memory." *Law Times*, 119.
Weight of evidence of railroad employees in actions of negligence. Tucker v. Duncan, in full, U. S. C. C., S. D. Miss., 13.
What amounts to arrest to render confessions inadmissible, dig. S. C. Tex., 195.
What competent to establish a deed of gift *inter vivos*, dig. S. C. Col. 498.
What must be shown in impeaching witness, dig. S. C. Cal., 195.
When formal notice to produce document is unnecessary, dig. S. C. Ohio, 476.
See Equity, Agency, Attorney and Client, Criminal Law, Negotiable Paper, Sheriff's Sale.

EXECUTION.
Confirmation of execution sale where process was served by publication. Johnson v. Lindsay, S. C. Kan., 393.
"Effect of delays and irregularities in enforcing executions." A. J. Hirschl, 183.
Exemption of U. S. pension from execution and attachment, dig. S. C. Iowa, 317.
Validity of lien on real estate, dig. Ky. Ct. App.. 498.

EXEMPTONS.
Cumulative exemptions are not allowed to a person of more than one calling, dig. S. C. Kan., 318.
"Head of a family," dig. Ky. Ct. App., 298.
Of United States pension from attachment and execution, dig. S. C. Iowa, 318.
Who is a "householder?" dig. S. C. Ind., 357.
Who is the head of a family? dig. Ky. Ct. App., 139.
See Homestead.

EXECUTORS.
See Statute of Limitations, Administration.

FACTOR.
See Agency.

FEDERAL COURTS.
Citizenship of parties as affecting jurisdiction, dig. U. S. S. C., 278.
Collusion to give Federal courts jurisdiction. Hawes v. Contra Costa Water Co., in full, U. S. S. C., 288.
Concurrent State and Federal jurisdiction. Dashing v. State, S. C. Ind., 351.
Collusive conveyance to give jurisdiction. Coffin v. Haggin, U. S. C. C., D. Cal., 390.
Collusive parties to give jurisdiction, dig. Ky. Ct. App., 298.
Jurisdiction of assigned judgment, dig. U. S. S. C., 273.

FEDERAL JURISDICTION.
"Lien of judgments in Federal courts." E. G. Taylor, 304.
Of murder committed in the Ute Reservation, dig. U. S. S. C., 318.
Practice on writs of error *coram nobis* does not follow state practice. Bronson v. Schulten, in full, 250.
The construction given by the Supreme Court of a State to a statute of limitations of the State will be followed by this court in a case decided the other way in the circuit court before the decision of the State court. Moores v. Citizens' Nat. Bank, U. S. S. C., 228.
Jurisdiction of Supreme Court in admiralty as to findings of fact, dig. 158.
What amounts to a Federal question? dig. U. S. S. C. 195.
"What is a Federal question," dig. U. S. S. C., 438.
See Appeals.
Writ of error to State court, dig. U. S. S. C., 159.

FEDERAL PRACTICE.
Issues of fact in equity, dig. U. S. C. C., E. D. N. Y., 158.

FEDERAL SUPREME COURT.
Appointment of Mr. Justice Gray. C. T., 1.

FIXTURES.
Gas fixtures are chattels, dig. S. C. Pa., 416.
Subsequently annexed to realty, how affected by mortgage, dig. S. C. Me., 457.

FORGERY.
See Jurisdiction.

FRAUD.
Lien released in consequence of fraudulent representations not revived because of intervening equities of third persons, dig. S. C. Pa., 139.
Silence as to title of real property, dig. S. C. Pa., 219.

FRAUDULENT CONVEYANCE.
A conveyance upon immoral consideration fraudulent as to creditors, dig. S. C. Ill., 379.
A conveyance when judgments are outstanding is fraudulent, without proof of fraudulent intent, dig. S. C. Iowa, 457.
An assignee for benefit of creditors not a purchaser for value and good faith on his part will not protect an assignment executed with fraudulent intent. Craft v. Bloom, in full, S. C. Miss., 408.
Can a fraudulent grantee prefer the grantor's creditors. Q. & A., 180.
No resulting trust will arise in behalf of the children of the grantor in a fraudulent conveyance. Eastham v. Roundtree, in full, S. C. Tex., 190.
Personal liability of grantee to creditors, dig. S. C. Wis., 478.
Rights of subsequent creditors, dig. Eng Ct. App.,
Subrogation to creditor's rights under, dig. S. C. Iowa, 37.
Title taken in name of wife, dig. S. C. Iowa, 318.
The marriage relation as a consideration for a conveyance as against pre-existing debts, dig. Ky. Ct. App., 259.
Where the grantor is solvent at the time of the conveyance the burden of proof is on subsequent creditors attaching it, dig. S. C. Mich., 417.
Where lands are exchanged, and one of the deeds is adjudged void as to the grantor's creditor's, this does not affect the validity of the other deed, dig. S. C. Wis., 178.
See Husband and Wife; Insolvency.

GARNISHMENT.
Administrator not subject to before final order of distribution, dig. S. C. Wis., 278.
A foreign corporation qualified to do business in the State subject to, dig. S. C. Pa., 96.
Obligations within the process, dig. S. C. Kan., 398.

GAS COMPANY.
Injunction to prevent removal of meter. C. T., 301.

GIFT.
Gift *causa mortis* by infant, dig. Eng. High Ct., Ch. Div., 358.
"Gifts *causa mortis*." Henry Wade Rogers, 362.
Right of revocation before delivery of deed. Q. & A., 97.
What will amount to undue influence to avoid a gift to a person standing in the confidential relations of medical man. Mitchell v. Homfray, in full, Eng. Ct. App., 232.
See Evidence.

GUARDIAN.
Evidence of mental unsoundness in application for, dig. S. C. Iowa, 317.

GUARANTY.
Construction and scope of a contract of guaranty, dig. N. Y. Ct. App., 397.
Discharge of the guarantor by acts of the creditor, dig S. C. Tex. Comr. App., 159.
Distinction between contracts of guaranty and suretyship, dig. S. C. Pa., 417.

GUITEAU TRIAL.
"Guiteau a moral monstrosity." *Springfield Republican*, 40.
"Guiteau under cross-examination." *New York Daily Register*, 59.
Judge Cox and the lay press. C. T., 1.
"Judge Cox Defended," a letter from Judge McCurdy of Connecticut to the New York Tribune, 200.
Reflections upon the conclusion of. C. T., 81.
"Some lessons of the Guiteau case." *New York Daily Register*, 100.

HOMICIDE.
A prisoner charged with murder should be judged in the light of the circumstances as they appeared to him at the time, dig. Tex. Ct. App., 218.
Facts constituting murder in the first degree, dig. S. C. Pa., 158.
If a person disturbing the peace resists arrest, and in so doing kills the officer making the arrest, he is guilty of murder if he knew him to be an officer, and guilty of manslaughter if he did not know it, dig. Ky. Ct. App., 138.
Mr. Justice Maule's summing of the defense of insanity, note, 40.
"The defense of insanity." *London Times*, 39.
See Criminal Law.

HOMESTEAD.
Effect of wife's abandonment of husband upon his right, dig. S. C. Mich., 417.
Evidence of domicil, dig. S. C. Tex., 218.
Lease of barn is not an abandonment of homestead, dig. S. C. Neb., 379.
Limitations upon the right to recover, dig. S. C. Ga., 238.
Married woman may be "head of family," dig. S. C. Mich., 417.
Minors' rights in the homestead after the death of the wife, dig. S. C. Ga., 219.
Mortgage without wife joining in it, dig. Ky. Ct. App., 298.
Necessary allegations in applications for, dig. S. C. Ga., 238.
Permanently removing from a homestead amounts to an abandonment of the exemption, dig. S. C. Minn., 80.
Removal to foreign state amounts to an abandonment, dig. S. C. Mich., 417.
Temporary absence is not an abandonment, dig. S. C. Iowa, 318.
What amounts to a surrender of possession, dig. S. C. Ill., 398.

HUSBAND AND WIFE.
"Adultery in actions for divorce." Joseph A. Joyce, 162.
Chattel gift by husband to wife as against husband's creditors, dig. Superior Ct. N. Y. 259.
"Conveyance in fraud of dower." Seymour D. Thompson, 162.
Curtesy in wife's separate estate, dig. S. C. Mo., 398.
Custody of minor wife, dig. S. C. Ga., 278.
"Estates by Curtesy." Wm. L. Murfree, Jr., 382.
Fraudulent conveyance of wife's separate estate, dig. U. S. S. C., 457.
Husband's duty to maintain his wife, lack of estate, note, 160.
Husband's liability where a married woman is a co partner in a firm, dig. S. C. Pa., 259.
Levy of execution against husband on wife's property, remedy against sheriff, dig. S. C. Pa., 298.
Liability of husband for ante-nuptial debts of wife, dig. Eng. High Ct., Q. B. Div., 159.
Married woman's torts, dig. S. C. Pa., 357.
Mechanics' lien to charge wife's property, dig. S. C. Ind., 357.
No obligation upon widow to pay husband's mortgage, dig. S. C. Ind., 178.
Parol lease of wife's real estate, dig. S. C. Ind., 438.
Purchase of land with wife's funds and title by mistake in husband's name, dig. S. C. Kan., 178.

HUSBAND AND WIFE—Continued.
Right of action by wife against husband as affected by the statute of limitations, dig. S. C. Iowa, 457.
Sufficiency of consideration necessary to the validity of a deed from husband to wife as against husband's creditors, dig. S. C. Wis., 19.
Tenancy in common by husband and wife, dig. Md. Ct. App., 298.
The wifes separate estate, mortgaged to secure a debt of the husband has all the advantages of a third party surety, dig. S. C. Tex., 37.
Wife's interest in husband's land, dig. S. C. Ind., 417.
See Married Woman.

INFANCY.
"The latest views of injuries to infants.,' James P. Oliver, 282.
What amounts to a fiduciary relation to avoid a gift *causa mortis* by infant, dig. Eng. High Ct., Ch. Div., 358.

INJUNCTION.
To restrain gas company from removing meter. C. T.,' 301.
To restrain slaughter house as nuisance, dig. Md. Ct. App., 337.
Where no bond is given for an injunction, a contempt in disregarding it can not be punished by fine and imprisonment, dig. S. C. Ohio, 117.
See Common Carrier; Master and Servant.

INNKEEPERS.
"Innkeepers and their liability for the property of their guests." W. W. Ramsey, 206.

INSANITY.
Produced by quinine, note, 40.

INSOLVENCY.
An assignee for benefit of creditors is not a purchaser for value and good faith on his part will not protect an assignment executed with a fraudulent intent. Craft v. Bloom, in full, S. C. Miss. 403.
Assignment from one partner to another of firm assets not an assignment for benefit of creditors, dig. S. C. Ill., 379.
An equity of redemption in personal property mortgaged under a chattel mortgage will pass to an assignee for the benefit of creditors, dig. S. C. Iowa, 37.
Can a fraudulent grantee prefer the grantor's creditors? Q. & A., 180.
'Composition agreements—Bank v. Hoeber again." A. G. Scott, 325.
Composition agreements. C. T., 321.
Composition agreements. C. T., 281.
Confession of judgment by insolvent debtor not a fraudulent preference, dig. S. C. Pa., 259.
Debtor's right to prefer his father to other creditors, dig. S. C. Mich., 336.
Distinction between a composition and a voluntary assignment. Robbins v. Magee, in full, S. C. Ind., 129.
Duties of assignee under an assignment for the benefit of creditors, dig. S. C. Pa., 139.
Effect of secret bonus to creditor on composition agreement. Bank of Commerce v. Hoeber, in full, St. Louis Ct. App., 293.
Fraudulent composition agreement, dig. S. C. Ill., 379.
Preference of *bona fide* credit by confessed judgment, dig. S. C. Pa., 438.
Revaluation of insurance policies in an insolvent company where the insured have died since the proof of the claim, dig. N. Y. Ct. App., 219.
Right of banker to set-off account of insolvent depositor against his note. Q. & A., 295.
Right of bank to set-off note of insolvent depositor against his account, dig. S. C. Pa., 219.
See Fraudulent Conveyance; International Law; Partnership.

INSURANCE.
Construction of consent of company to additional insurance, dig. S. C. Iowa, 336.
Losses upon policies, after dissolution of insolvent companies, dig. S. C. Pa., 196.
Misrepresentation in application, dig. Ky. Ct. App., 399.
Fire.
Distinction between open and valued policies, dig. S. C. Ohio, 417.
Payment of premium with note, loss when note is overdue and unpaid, dig. S. C. Ohio, 308.
Removal of goods insured, dig. S. C. R. I., 37.
Waiver of stipulation not to sue after six months from loss, dig. S. C. Wis., 139.

INSURANCE—Continued.
Life.
Assignment of life policies as affected by payment of premium by assignee. Armstrong v. Mutual Life Ins. Co. of New York, in full, N. S. C. C., E. D. N. Y., 430.
Construction of words "never sick" in application, dig U. S. S. C., 159.
Intoxication and life insurance. C. T., 281.
Policy for the use of the wife is not changed in its character by being changed for a paid up policy; assignment of, dig. N. Y. S. C. 57.
Profits earned by a mutual company in liquidation of premium, dig. S. C. Pa., 478.
Revaluation of policies in an insolvent insurance company, where the insured have died after the proof of the claim, dig. N. Y. Ct. App., 219.
Right of holder of endowment policy to notice of change of agency for payment of his premium, dig. U. S. C. C., D. Mass., 438.
The Kennebec Masonic Relief Association a mutual insurance company, dig. S. C. Me., 457.

INTERNATIONAL LAW.
Custody of non-resident minor in divorce cases. C. T. 261.
Enforcement of law of another nation in admiralty courts, dig. U. S. S. C., 257.
Rights of assignee for benefit of creditors, appointed in foreign jurisdiction as to personal property. dig. N. Y. Supreme Ct., 219.
"Suits brought on the same cause of action in different States; and actions on judgments from another State." By Wm. Archer Cocke, 225.
See Conflict of Law.

JUDGMENT.
Amendment of judgment by writ of error *coram nobis*, dig. U. S. S. C., 196.
Assignment of, after payment. dig. S. C. Ind., 399.
Conclusiveness of judgment in collateral proceedings, dig. S. C. Pa., 178.
Equitable relief against judgment by default, dig. U. S. S. C , 158.
Identity of cause of action and parties on a plea of former recovery, dig. S, C. Cal., 417.
In absence of special agreement a note is not a satisfaction of a judgment, dig. S. C. App. Va., 139.
Invalidity of judgment lien for want of legal notice, dig. S. C. Ohio, 259.
It is error to reverse or modify a judgment without having the parties to be affected by such modification or reversal before the court, dig. S. C. Ohio, 117.
"Lien of judgments in Federal Courts." E. G. Taylor, 304.
Lien of replevin bail who has paid a judgment levied upon real estate. Downey v. Washburn, in full, S. C. Ind., 215.
May be modified by writ of error *coram nobis* during the term at which they were rendered but not after. Bronson v. Schulten, in full, U. S. S. C., 250.
Parties and privies only may invoke a judgment as decisive in their favor, dig. S. C. Pa., 458.
Satisfaction of judgment by sale under, dig. U. S. S. C., 278.
Setting aside judgment on the ground of excusable neglect to appear and defend, dig. S. C. N. C., 239.
Suit on judgment against heirs of defendant. Q. & A., 296.
The irregular judgment of a court of competent jurisdiction is not void but voidable and can not be collaterally attacked, dig. S. C. Tex. Comrs. App., 80.
The lien of, will not be declared invalid for want of notice to defendant without showing of meritorious defense, dig. S. C. Ohio, 178.
The plea *res adjudicata* depends upon the identy of the cause of action, dig. Tex. Ct. App., 238.
Where attorney acting for distinct interests obtains two judgments a court of equity will recognize no priority but distribute *pari passu*, dig. S. C. D. C., 438.
Where lien of a judgment on real estate is rendered by private agreement subordinate to that of a subsequent mortgage but no change is made in the record, an innocent purchaser for value at execution sale will not be affected by the equities between the parties to such agreement, dig. S. C. Kan., 178.
Who are bound by. Hale v. Finch, in full, U. S. S. C., 6.
See Practice.

JUDICIAL REFORM.
A modern instance of Jarndyce v. Jarndyce. C. T. 161.

JUDICIAL REFORM—Continued.
"Judicial division of labor." *New York Daily Register*, 119.
Judicial nepotism. C. T., 61.
Notice of Mr. Torrey's paper at the meeting of the Missouri Bar Association on the Judicial System of Missouri. C. T., 1.
Plans before Congress for the relief of the United States Supreme Court. C. T., 141.
Relief of the Supreme Court of the United States. C. T., 381.
Resolutions of the Missouri Bar Association on the measures proposed for the relief of the Federal Supreme Court. C. T., 21.
Simplification of records in appealed cases. C. T., 221.
The progress of codification, note, 220.

JUDICIARY.
Comments upon the nomination of Mr. Conkling to the Federal Supreme Bench. C. T., 181.
Confirmation of Mr. Justice Blatchford. C. T., 241.
Having been of counsel as a disqualification of judge, dig. S. C. Tex., Comr. App., 159.
Judicial methods of dealing with obstreperous persons, note, 180.

JURISDICTION.
Where a person forges and utters, at Kansas City, Missouri, a time check upon a railroad company having its treasurer and treasury within this State, and such check is paid off by the agent of the company at Kansas City, having authority to pay the valid obligations of the company, upon the supposition that the check is a true and valid instrument, the forgery is wholly consummated in Missouri, although, afterwards, the agent sends the check to the treasurer of Topeka, Kansas, and is given credit therefor on his accounts as so much cash. *In re* Carr; *In re* Dillon, in full, S. C. Kan., 495.
Where trust was created by will in another State, dig. S. J. C. Mass., 178.
See Admiralty, Federal Courts.

JUROR.
Disqualification of as ground for new trial, dig. S. C. Kan., 159.
See Jury Trial.

JURY TRIAL.
Affidavits of jurors to show misconduct or mistake in arriving at a verdict. C. T., 261.
A fixed opinion, no matter how acquired, is sufficient to render a juror incompetent, dig. S. C. Pa., 19.
Anecdote of a famous French jury lawyer, note, 500.
"A reasonable doubt." A. G. McKean, 446.
"Chance Verdicts." Edwin G. Merriam, 341.
"Comments of the judge upon the evidence." Addison G. McKean, 166.
Directing a verdict in a criminal case is error, dig. U. S. C. C., D. Kan., 437.
Effect of incompetency of juror upon verdict, dig. S. C. Kan., 336.
Failure to interrogate a juror upon a criminal trial is a waiver of objection on the ground of non-residence, dig. S. C. Neb., 336.
Form of verdict, dig. U. S. S. C., 358.
In action for libel it is not improper to inform the jury of the amount of damages to carry the costs, dig. S. C. Mich., 416.
Informality in polling the jury no ground for new trial, dig. S. C. Ga. 138.
Innocent, casual communication to the jury by the successful party not ground for new trial, dig. S. C. Minn., 80.
Instruction assuming facts which are not proven, dig. U. S. S. C., 278.
Juror rendered incompetent by wager. Seaton v. Swem, in full, S. C. Iowa, 334.
"Misconduct of counsel in agreement." W. F. Elliott, 408.
Misconduct of juror. C. T., 301.
Misconduct of jurors as ground for new trial, dig. S. C. Me., 478
Misconduct of jury and bailiff as ground for new trial, dig. S. C. Ga., 238.
Ordering a view of the burned premises by the jury in a suit on a fire policy is not error, dig. S. C. Wis., 139.
Possibilities of the system, note, 200.
Proposed abolition of jury trial in civil causes in England. C. T., 281.
"Right of prosecution to stand juror aside." Edwin G. Merriam, 402.
Statutory requirement that instructions shall be in writing. Hopt v. People, in full, U. S. S. C., 269.
JURY TRIAL—Continued.
Taking the case from the jury, dig. S. C. Pa., 260.
Waiver of objection to juror for incompetency in criminal case, dig. S. C. Kan., 336.
Weight to be given to expert testimony in action by attorney for compensation for professional services. Head v. Hargrave, in full, U. S. C. C., 388.

JUSTICES' COURTS.
Justice's jurisdiction in contempt cases, dig. S. C. N. J., 47.
Justice practice according to Jefferson's manual, note, 300.
"Special pleading" before justice of the peace, note, 360

LANDLORD AND TENANT.
An entry to make repairs will not amount to an eviction, dig. S. D. Pa., 219.
Damages for breach of covenant not a set-off for rent dig. S. C. Pa., 159.
Evidence of acceptance of the surrender of a lease, dig. S. C. Pa., 219.
Liability of tenant to mortgagee for rents and profits Q. & A., 419.
Proceeedings against landlord to bind tenant, dig. S. C. Tex., 298.
"The Irish Land Act." *Daily Telegraph* (London). 175
When does the relation exist, dig. Ky. Ct. App., 219.

LAND OFFICE.
Practice in the, dig. U. S. S. C., 278.

LEGAL LITERATURE.
"Abbreviations." *New York Daily Register*, 279.
Indexing and digesting, corresp., 376.
Indexing and digesttng in England. *Solicitor's Journal*, 360.
Indexing and digesting in England. C. T., 341.
Useless lumber in the reports. C. T., 161.
See Book Reviews, Digesting and Indexing.

LIBEL.
Distinction between public and private affairs as bearing upon privileged communications, dig. U. S. C. C., D. Mass., 278.
Where a libel is in a foreign language, it is not necessary to show that it was understood, dig. S. C. Mich., 417.

LIENS.
"Equitable liens upon personal property." Benj. F. Rex, 42.
"Lien of judgments in a Federal court." E. G. Taylor, 304.
Of replevin bail who has paid a judgment levied upon real estate. Downey v. Washburn, in full, S. C. Ind., 245.
See Administration; Chattel Mortgage; Judgment; Vendors Lien.

LIMITATIONS.
Effect of partial payment by principal debtor upon surety's liability, dig. S. C. Ohio, 178.
New promise to remove the bar of the statute, S. C. Pa., 19.
Statute runs in favor of surety, though debt of principal is kept alive by proceedings in bankruptcy, dig. S. C. Tex., 19.
See Statute of Limitations.

MALICIOUS PROSECUTION.
A discharge by the examining magistrate shifts the burden of proving probable cause to the prosecutor, dig. S. C. Pa., 458.
Burden of proof of malice and probable cause, in action against municipal authorities, dig. S. C. Pa., 80.
Facts amounting to reasonable and probable cause, dig. Eng. Ct. App., 299.
Liability of a corporation for. C. T., 401.
Requisite allegations in a petition for damages for malicious prosecution, dig. S. C. Iowa, 458.
"The action of malicious prosecution — probable cause." By John D. Lawson. I, 62; II, 82.
What amounts to probable cause—"arrest and liberation," dig. S. C. Cal., 298.
Liability of corporation for, dig. S. C. Mo., 456.

MANDAMUS.
Office of the writ as against Federal officers, Q. & A., 98.
Office of the writ when directed to public officer, dig. U. S. S. C., 196.
Office of writ when directed to public officer, dig. U S S. C., 438.

MANDAMUS—Continued.
Proper parties to a proceeding for *mandamus* to allow appeal, dig. U. S. S. C., 196.
Where an inferior court has improperly sustained a plea to the jurisdiction in a cause before it, *mandamus* will lie in the Supreme Court to compel the judgr of such inferior court to proceed with the cause, although he may be of the opinion that his court has no jurisdiction, and so alleges in his return. State *ex rel.* Laughlin, in full, S. C. Mo., 454.

MANSLAUGHTER.
See Criminal Law.

MARRIAGE.
Validity of slave marriage. Q. & A., 59, 98, 179.
Within the prohibited degrees in Ohio. Q. & A., 339.

MARRIED WOMAN.
A married woman may join her husband in a valid deed, incumbering her separate estate to secure the debt of a third person, without consideration accruing to her, dig. S. C. Tex., 37.
A threat of suicide by the husband to induce his wife to sign a note will not amount to duress, dig. N. J. Ct. Errors and Appeals, 37.
"Conveyances in fraud of dower." Seymour D. Thompson, 102.
Failure to attempt to serve her with process at her house is want of diligence, dig. U. S. D. C., S. D. N. Y., 37.
Failure of consideration may be pleaded in defense of notes given to a married woman for a void deed, dig. S. C. Ind., 196.
Her acceptance of bill of exchange to pay debt of another is void, dig, S. C. N. J., 37.
Not entitled to damages for loss of time resulting from personal injuries, in her action, unless she was prosecuting separate business, dig. S. C. Iowa, 37.
Not estopped by the covenants of husband's conveyance in which she joins, dig. S. C. Iowa, 37.
Power to confess judgment, dig. S. C. N. J., 299.
Rescission of deed, dig. Ky. Ct. App., 399.
Silence as to title to real estate to constitute fraud, dig. S. C. Pa., 219.
The pleading of coverture by a married woman, who is the principal on a bond, will not measure the liability of the surety, dig. S. C. Mo., 196.
See Husband and Wife, Homestead.

MASTER AND SERVANT.
A servant will be enjoined from using his knowledge of his master's affairs to engage in a business enterprise during the continuation of the service antagonistic to the interests of his master. Gower v. Andrews, in full, S. C. Cal. 50.
Injury to servant in consequence of the unreasonable regulation of superintendent. Pittsburgh, etc. R. Co. v. Henderson, in full, S. C. Ohio, 235.
Knowledge of servant of the insufficiency of apparatus, dig. S. C. W., 178.
Master's duty to inform servant of facts affecting his safety, dig. U. S. C. C., D. Col., 159.
Master's liability for servant's negligence, within the scope of his duty ,dig. N. Y. Ct. App., 399.
Snow shoveler going to clear the track not the fellow-servant of train hands, dig. S. C. Wis., 178.
The relation does not exist between an employer and an independent contractor over whom he has no control so as to render the former liable for the latter's negligence, dig. S. C. Pa., 57.
The relation does not exist between a school district and an independent contractor employed to make alterations in a school building, dig. S. C. Pa., 57.
What circumstances will warrant the conclusion the hiring is for a year, dig. S. C. Ohio, 80.
When does the relation of fellow-servant exist, dig. S. C. Ohio, 279.
Who is a fellow-servant, dig. U. S. C. C., D. Minn., 299.

MECHANIC'S LIEN.
A foreman in a silver mine held to be a mechanic within the law. Falstaff Silver M. Co. v. Cullins, in full, U. S. S. C., 29.
To charge wife's property, dig. S. C. Ind., 257.

MINING LAWS.
Renewal of work upon claim before a relocation, dig. U. S. S. C., 279.

MORTGAGE.
Accounting by mortgagee in possession, dig. S. C Cal., 299.
Adverse and paramount title can not be litigated in foreclosure proceedings, dig. S. C. Mich. 140.

MORTGAGE—Continued.
A sale under subsequently set aside is not a satisfaction, dig. U. S. S. C., 117.
Distinction between mortgage and conditional sale, dig. S. C. Kan. 177.
Effect of satisfaction of mortgage on a verbal gift of accrued interest, dig. S. C. Mich., 416.
Equitable mortgage by deposit of title deeds. *Irish Law Times*, 426.
Liability of tenant to mortgagee for rents and profits. Q. & A., 419.
Mortgagee's right of action against one assuming a mortgage, dig. S. C. Ind., 335.
Necessary parties to foreclosure proceedings. Q. & A., 240.
Provision in foreclosure for deficiency caused by failure to pay taxes, dig. N. Y. Supreme Ct., 336.
Release of the first mortgage by mistake of mortgagor who does not know of the existence of the second mortgage, will not avail the second mortgagee, dig. Ky. Ct. App., 57.
See Conveyance; Dower.

MUNICIPAL BONDS.
Construction of the Kansas Registration Act, dig. U. S. S. C., 478.

MUNICIPAL CORPORATIONS.
A city's control of market houses does not authorize the establishment of a monopoly, dig. S. C. Tex. Comrs. App., 97.
A reasonable and temporary obstruction of a public street for the sake of public safety is not unauthorized and illegal, Simon v. City of Atlanta, in full, S. C. Ga., 411.
"City licenses." A. J. Donner, 422.
Matter of form in subscriptions to capital stock of railroad, dig. U. S. S. C., 258.
Ratification of illegal act. Q. & A., 338.
Ratification of unauthorized acts. Q. & A., 319.

NATIONAL BANKS.
Responsibility of shareholders for debts of the bank, dig. S. C. Ill., 379.
Taxation by the United States of the capital of national banks when invested in foreign securities, dig. U. S. S. C., 159.
Usurious interest paid to a national bank upon renewal will not be admitted as a set-off to the note when sued on, dig. U. S. S. C., 97.
See Usury.

NEGLIGENCE.
Admissions of the superintendent of the defendant corporation of the defendant's liability for the injury sued on are inadmissible, dig. S. C. Wis., 140.
Anxiety to save his family distress will not justify a passenger for leaping from a train which does not stop at an accustomed station. I——, etc. R. Co. v. Bangs, in full, S. C. Mich., 156.
Burden of proof upon carrier of passengers, when the injury is caused by misplaced switch, dig. S. C. Pa., 478.
Carriage of cotton on open cars, dig. U. S. S. C., E. D. Mo., 377.
Charge to jury in action for negligent malpractice, dig. S. C. Pa. 259.
Duty of persons in crossing railroad tracks. Tucker v. Duncan, in full, U. S. C. C., S. D. Miss., 13.
Entering a sewer with a light when the plaintiff knew that gas was escaping into it is contributory negligence, dig. S. C. Pa., 37.
Evidence showing that injury received at railroad crossing was a pure accident, dig. S. C. Pa., 379.
In an action for damages caused by railroad fire, what facts will justify the conclusion that the fire was caused by the engine, dig. S. C. Minn., 80.
In action for railway fires the condition of the spark arrester is competent, dig. S. J. C. Mass., 38.
It is negligence for a gas company to permit gas to escape where it may probably find its way into the sewer and cause an explosion, dig. S. C. Pa., 37.
It is a valid defense to an action against a railroad company, for an injury to personal property by negligence, to plead that the injury was committed while the road was in the hands of a receiver, dig. S. C. Mo., 196.
Injuries to servant in consequence of unreasonable regulation of superintendent. Pittsburgh, etc. R. Co. v. Henderson, in full, S. C. Ohio, 235.
Killing stock by railroad in corporate limits of city. Wallace v. St. Louis, etc. R. Co., in full, S. C. Mo., 313.
Knowledge of servant of the insufficiency of appliances, dig. S. C. Wis., 178.

NEGLIGENCE—Continued.
Liability of cattle owner for injury to train hand resulting from a collision with cattle, dig. S. C. Kan., 178.
Liability of clerk and sureties for error in public record, in full, S. C. Tex., 374.
Liability over municipal corporation for maintaining excavation, dig. S. C. Ind., 239.
Liability of owner of a race horse, for injury to another horse in the race resulting from foul riding, dig. U. S. C. C., N. D. Ill., 299.
Liability of municipal corpo ration for injury caused by the fall of snow from mu nicipal building. Q. & A., 377.
Master's duty to apprise a young and inexperienced servant of the danger of machinery. Dowling v. Girard B. Allen Co., in full, S. C. Mo., 92.
Master's liability for servant's negligence within scope of his duty, dig. N. Y. Ct. App., 399.
Passengers injured in alighting from moving train. Strauss v. Kansas City, etc. R. Co., in full, S. C. Mo., 355.
Proximate and remote cause of personal injury. C. T., 101.
Remoteness of damages. C. T., 321.
Starting a runaway, dig. S. C. Mo., 196.
Statutory limits to liability of railroad companies for stock killed by trains, dig. S. C. Wis., 159.
Master and Servant.
The introduction by the employer of new and unusual appliances involving unanticipated danger to the employee, without giving notice to such employee of the character of the new appliances, is negligence, dig. U. S. C. C., E. D. Mo., 37.
"The latest views of injuries to infants." James P. Oliver, 282.
The regulation of a telegraphic company requiring a message to be "repeated" to render the company liable for a mistake is unreasonable, dig. S. C. Ga., 219.
When does the relation of fell ow servant exist, dig. S C. Ohio, 279.
Who is a fellow servant? dig. U. S. C. C., D. Minn., 299.
Fellow Servant.
A detective employed by a railroad company is not fellow servant of the train men managing the train upon which he is riding, dig. S. C. Wis., 57.
A foreman in charge of a separate department of the work, whose directions an employee is directed to obey by the foreman of the establishment, is not a fellow servant of such employee. Dowling v. Girard B. Allen Co., in full, S. C. Mo., 92.
See Evidence; Master and Servant.

NEGOTIABLE PAPER.
Accord and satisfaction by acceptance of negotiable paper for lesser amount. C. T., 401.
An indorser, though he be a stranger writing his name on the back of the bill of exchange, warrants the genuineness of the bill and of the indorsements. Cochran v. Atchison, in full, S. C. Kan., 414.
Assignment of as collateral, dig. S. C. Ind., 358.
A stipulation for collection expenses in an instrument in the form of a note destroys its negotiability. Morgan v. Edwards, in full, S. C. Wis., 33.
Bona fide holder of overdue check. London and County Bank v. Groome, Eng. High Ct., Q. B. Div., 328.
Burden of proof on holder to show *bona fides*, dig. Md. Ct. App., 478.
Constructive delivery of promissory note, dig. S. C. Ind., 140.
"Does stipulation for attorney's fee render a promissory note non-negotiable?" Edwin Vanlise, 266.
Effect of acceptance in blank of bill of exchange upon surety, dig. Eng. High Ct., Ch. Div., 358.
Effect of the fact that a bill of exchange is made payable to a fictitious person upon the rights of a *bona fide* holder. Kohn v. Watkins, in full, S. C. Kan., 76.
Evidence of a parol agreement between the parties that an indorsement in blank should have the effect of an indorsement "without recourse" is inadmissible. Martin v. Cole, in full, U. S. S. C., 46.
Extrinsic evidence to show that an ambiguous instrument is a negotiable note, dig. Eng. Ct. App., 358.
Firm indorsement in hands of *bona fide* holder for value, dig. U. S. C. C., E. D. La., 160.
In an action by indorsee, an accommodation indorser can not set up an agreement with the maker at the time of signing the paper that their obligation should be joint and not successive, dig. S. C. N. J., 38
Indorsement to bank for collection, dig. Ky. Ct. App., 498.

NEGOTIABLE PAPER—Continued.
Innocent holder for value, dig. S. C. Mich., 379.
Note inadvertently sealed, dig. S. C. Pa., 337.
Parol evidence is admissible as between the parties to show the true relations between them, dig. S. Ct. Err. Conn., 58.
"Promissory Note — Does Stipulation for attorney's fee render it non-negotiable?" E. G. Taylor, 86.
Release of accommodation indorser of note by extension of credit by holder, dig, S. C. Mo., 438.
The acceptance of a bill of exchange by a married woman to pay the debt of another is void, dig. S. C. N. J., 37.
The erasure of the word "surety" after the signature of one of the makers is a material alteration, dig. S. C. Tex. Comrs. App., 38.
The indorsement of a promissory note as a collateral security for a pre-existing debt, is in due course of business, and the indorsee is regarded as an innocent holder for value. Straughan v. Fairchild, in full, S. C. Ind., 413.
The writing by the payee of the word "collector" after his own name in the body of the instrument is a material alteration, dig. S. C. N. J., 38.
Transfer by assignment or sale instead of indorsement, dig. S. C. Mich., 337.
What is an accommodation maker, dig. S. C. Wis., 19.
What is unreasonable delay in presentation to relieve indorser, dig. S. C. Mich., 417.
What will constitute an instrument the note of a corporation, dig. S. C. Ind., 239.
Where an individual note of partner is indorsed with the firm name, the form of the note is not notice that it is given for the maker's accommodation and in fraud of the firm. Redion v. Churchill, in full, S. C. Mo., 412.
Where the maker of a note is insolvent, a failure on the part of an indorsee to prosecute it to judgment against him will not prejudice his claim against the indorser. Martin v. Cole, in full, U. S. S. C., 45.
See Bill of Lading, Chattel Mortgage.

NEW TRIAL.
Affidavit of jurors to show misconduct or mistake in arriving at a verdict. C. T., 261.
Informality in polling the jury no ground for new trial, dig. S. C. Ga., 258.
Misconduct of jurors as a ground for a new trial, dig. S. C. Me., 478.
Motion for new trial on the ground of disqualification of juror, dig. S. C. Kan., 159.
See Judgment; Practice.

NOTICE.
Effect of the withholding of a chattel mortgage from record, upon the rights of a creditor purchasing with notice. Wilson v. Milligan, in full, S. C. Mo., 231.
"Notice of unrecorded deed to subsequent purchaser or attaching creditor." Wm. L. Murfree, Jr., I., 122; II., 142.
Of parol contract collateral to deed, dig. S. C. Pa., 318.
Parties are charged with notice of the contents of will or deed through which they derive title, dig. S. C. Tex., 58.
Presumptions as to notice by mail or telegrams, dig. S. C. Col., 498.
To corporation to bind the pledgee of stock, dig. S. C. Kan., 179.
To subsequent purchaser of the lien of a replevin bail who has paid a judgment levied upon real estate. Downey v. Washburn, in full, S. C. Ind., 215.
Where funds held in fiduciary capacity are deposited in bank, what amounts to notice of the trust, dig. S. C. Ind., 177.
See Chattel Mortgage.

NUISANCE.
Injunction to restrain slaughter house, dig. Md. Ct. App., 337.
Liability of purchaser of land upon which a nuisance is already established, dig. S. C. Mo., 479.

PARENT AND CHILD.
Rights of parent and foster parent, dig. S. C. Ind., 358.

PARTNERSHIP.
Attachment of assets of insolvent firm in the hands of individual creditors, dig. S. C. Me., 458.
Continuation after death of member, dig. S. C. Errors, Conn., 19.
Discharge in bankruptcy from individual debts will not affect partnership debts, dig. Ky. Ct. App., 219, 259.
Effect of dissolution on negotiable paper indorsed subsequently, dig. N. Y. Ct. App., 299.

PARTNERSHIP—Continued.
Effect of the sale upon dissolution of the outgoing partner's liability to firm creditors who had knowledge of the transaction, dig. S. C. Wis., 58.
Estoppel from denying partnership liability, dig. S. C. Wis., 239.
Evidence to establish, dig. S. C. Pa., 259.
Firm indorsement of negotiable paper in hands of innocent holder for value, dig. U. S. C. C., D. La., 160.
Firm liability for indorsement of individual note. Redlon v. Churchill, in full, S. C. Me., 412.
Husband's liability where a married woman is a copartner, dig. S. C. Pa., 259.
Liability for timber,unlawfully cut, purchased by firm, dig. S. C. Wis., 239.
Partner's power in settling firm business, dig. S. C. Ill., 380.
Record title of firm real estate being in one member, a conveyance by him to secure his individual debt will not divest the equitable title of the firm, dig. S. C. Wis., 458.
Right to the discovery of the books of a firm in partnership accounting, dig. Superior Ct. N. Y., 259.
Right of possession of partnership property, dig. S. C. Ga., 220.
To what extent partnership real estate is treated as personalty, dig. U. S. D. C., W. D. Mo., 160.
What is a firm debt, dig. S. C. Pa., 438.

PASSENGERS.
See Common Carriers.

PATENT.
Assignment of, by corporation, dig. U. S. S. C., 438.
For iron from furnace slag is void for want of originality, dig. U. S. S. C., 439.
Letters patent No. 58,447 to Edward Mellon, void for want of novelty, dig. U. S. S. C., 117.
Liability for debts of patentee. Ager v. Murray, in full, U. S. S. C., 326.
Measure of damages for infringement, dig. U. S. S. C. 479.
Prior use though authorized will avoid the patent, dig. U. S. S. C., 220.
Variation in reissue from original patent, dig. U. S. S. C., 358.
What constitutes public use of an invention, dig. U. S. S. C., 279.
See Slander of Title.

PARTITION.
A judgment, mortgage or lien against the interest of one tenant in common is no bar to a partition at his instance or that of another of the tenants, dig. S. C. Pa., 80.

PENSION.
Exemption of U. S. pension from execution and attachment, dig. S. C. Iowa, 318.

PERISHABLE GOODS.
Is fashionable clothing perishable? C. T., 121.

PERJURY.
"The Genesis of Perjury." *London Times*, 106.

PLEADING.
Allegation of guilty knowledge in indictment for passing counterfeit bonds. C. T., 361.
Blank dates where time is of the essence of the allegation, dig. S. C. Ind., 259.
In action on a bond evidence of an adjustment is admissible under a general denial, dig. S. C. Mo., 439.
Joinder of diverse causes of action, dig. S. C. Wis., 380.
Mutability of legal principles as an obstacle to good pleading, note, 240.
Necessary averments in action for deceit and fraudulent representations, dig. S. C. Wis., 337.
Requisites of motion to make petition more definite and certain, dig. S. C. Kan., 260.
Separation and union of distinct causes of action in one suit, dig. S. C. Ill., 138.
Upon a contract where there is a novation of the original contract, dig. S. C. Ga., 196.

PLEDGE.
Larceny of pledge by pledgor, dig. S. C. Iowa, 317.

PRACTICE.
Amendment of judgments and decree during term, S. C. Tex., Comrs. App., 97.
"Comments of a judge upon the evidence." Addison G. McKean, 166.
Courts control of its orders after term passed, dig. Md. Ct. App., 359.

PRACTICE—Continued.
Evidence of execution of lost instrument sued on, purporting to have been signed by defendant, dig. S. C. Ind., 418.
"Limiting the time of argument of counsel," A. G. McKean, 45.
Limiting time within which to report, dig. S. C. Neb., 38.
"Misconduct of counsel in argument." W. F. Elliott, 406.
Right of the prosecution to stand jurors aside, C. T., 402.
Setting aside judgment on the ground of excusable neglect to appear and defend, dig. S. C. N. C., 239.
Taking the case from the jury, dig. S. C. Pa., 260.
The finding of a court sitting as a jury will be treated as the verdict of a jury, dig. S. C. Tex., Comrs. App., 58.
Where suit is on instrument purporting to be signed by defendant, affidavit to put signature in issue, dig. S. C. Mich., 380.
See Judgments.

PROMISSORY NOTE.
See Negotiable Paper.

PUBLIC LANDS.
Issue of patent pursuant to a treaty with Indian chief, dig. U. S. S. C., 439.

PUBLIC OFFICER.
A county officer not to be reimbursed for office rent when provided with an office in the court house which he refuses to occupy, dig. S. C. Wis., 97.
Compensation while disabled to perform duties, dig. N. Y. Ct. App., 359.
Expiration of term of office pending *quo warranto* proceedings, dig. S. C. Iowa, 337.
Liability of clerk and sureties for error in public records. Crews v. Taylor, in full, S. C. Tex., 374.
Resignation takes effect upon and in accordance with the terms of acceptance. State v. Clayton, in full, S. C. Kan., 269.
Resignation to avoid compliance with *mandamus*. Watts v. Lauderdale County, in full, U. S. C. C., D. West Tenn., 210.

PUBLIC POLICY.
See Fraudulent Conveyances.

QUIETING TITLE.
Scope of the proceeding, dig. S. C. Mich., 380.

QUO WARRANTO.
Expiration of term of office pending *quo warranto* proceedings, dig. S. C. Iowa, 337.
The issue of a writ against a public officer at the instance of a private relator is confined to the cases in which individual rights are touched, dig. S. C. Pa., 38.

RAILROAD COMPANY.
Borrowing money not *ultra vires*, dig. S. C. Pa., 337.

RAILROAD.
Passengers injured in alighting from trains. Strauss v. Kansas City, etc. R. Co., in full, S. C. Mo., 355.
Railroads and the public. C. T., 341.
"Statutory provisions for leasing railroads." W. H. Whittaker, 485.
See Conveyance; Evidence; Negligence.

REAL ESTATE.
"Estates by Curtesy." Wm. L. Murfree, Jr., 382.
"Real estate agents." J. M. Kerr, 202.

RECEIVER.
A receiver's right to issue certificates of indebtedness must be questioned by the bondholder, if at all, before they are sold to innocent purchasers, dig. S. C. Ill., 117.
Default must be ascertained before suit can be brought on bond of receiver, dig. S. C. N. C., 239.
Liability to suit beyond the appointing jurisdiction. Barton v. Barbour, in full, U. S. S. C., 347.
Of railroad has no implied authority to contract for municipal aid to complete the road, dig. U. S. S. C., 97.
See Negligence.

RECORDS.
"Notice of unrecorded deed to subsequent purchaser or attaching creditor." Wm. L. Murfree, J., I., 122; II., 142.
Liability of recorder in damages for defective search, dig. S. C. Pa., 239.
See Chattel mortgage.

RECORDING LAWS.

Title of grantee in quitclaim deed as against a prior unrecorded deed of which he had no notice. Fox v. Hall, in full, S. C. Mo., 31.

REFEREE.

Limited time within which to report, dig. S. C. Neb., 380.

REMOVAL OF CAUSES.

Citizenship of parties, dig. U. S. S. C., 197.

The fact that a foreign corporation carries on business in a State does not make it a resident of that State, dig, U. S. S. C., 97.

Where there is a conflict between Federal and State provisions, the Federal court will follow the Federal statutes, dig. U. S. S. C., 117.

REPLEVIN.

Goods seized under a writ against another party than the owner are not in *custodia legis*, and replevin will lie against the officer, dig. S. C. Iowa, 97.

Measure of damages in action on bond, dig. S. C. Neb., 380.

When is demand necessary before action brought. Q. & A., 418.

REPORTS OF DECISIONS.

Useless lumber in the reports. C. T., 161.

RESCISSION.

Compensation for improvements upon rescission of deed, dig. Ky. Ct. App., 399.

REVENUE.

Limitation of action to recover duties, dig. U. S. C. C., D. Oreg., 197.

RIPARIAN RIGHTS.

A riparian owner owns only to the bank and not to the center of a navigable stream. A riparian owner along a navigable stream does not own the ice which is formed on the stream adjacent to his land; and without first taking possession of and securing it, may not maintain an injunction to restrain a stranger from cutting and removing it. Wood v. Fowler, in full, S. C. Kan., 114.

Measure of damages for violation of riparian rights, dig. S. C. Pa., 218.

SALES.

"Defrauded vendors of chattels." James P. Oliver, 442.

Grounds of setting aside auction sale, dig. U. S. S. C., 158.

"Sale of goods by parties lacking title." By James P. Oliver, 146.

Sale of personal property with possession continuing in vendor, dig. S. C. Ind., 279.

The maxim *caveat emptor* not applicable where the vendor has a peculiar knowledge of the goods, dig. S. C. Tex. Comr. App., 318.

The purchaser of the good-will of a business from a trustee in bankruptcy has no right to restrain the bankrupt from commencing business afresh and soliciting his former customers, dig. Eng. Ct. App., 159.

"The right of stoppage in transitu." Charles B. Elliott, 242.

See Execution; Sheriff's Sale.

SEDUCTION.

In action for breach of promise the measure of damages may include the compensation for the loss of virtue, but not for loss of time and sickness resulting from miscarriage, dig. S. C. C. Wis., 38.

Measure of damages, dig. S. C. Ind., 489.

SEPARATE ESTATE.

See Husband and Wife.

SERVICE OF PROCESS.

Compliance with the statutes as to service of process upon foreign corporations will have the same effect as to such corporation that personal service has as to an individual. McNichol v. United States Mercantile Agency, S. C. Mo., 51.

Failure to attempt service of process upon a married woman, at her residence, when she is engaged in no business, is want of due diligence, dig. U. S. D. C., S. D. N. Y., 37.

Non-resident attending bankruptcy proceedings exempt from, dig. N. Y. Ct. App., 399.

On non-resident by publication. Johnson v. Lindsay, in full, S. C. Kan., 393.

Remedy for false return of due service. Q. & A., 276.

When it is clear from undisputed facts that through the want of any proper effort to make personal service, the process has been used in an unauthorized manner, such misuse will be corrected on motion, dig. U. S. D. C., S. D. N. Y., 38.

SET-OFF.

Damages to tenant by breach of covenant by landlord not a set-off for rent, dig. S. C. Pa., 159.

Damages for debauching daughter, dig. S. C. Wis., 498.

Damages growing out of a malicious attachment can not be pleaded as, in action for goods sold and delivered, dig. S. C. Minn., 456.

Of usurious interest paid against principal, dig. S. C. Meb., 337.

Right of a bank to set-off the note of an insolvent depositor against his account, dig. S. C. Pa., 219.

Right of bank to set-off insolvent depositor's account against his note. Q. & A., 295.

The set-off of one judgment against another is an exercise of equity jurisdiction, and the claims of attorneys for fees will be respected, dig. S. C. Ohio, 117.

Waste committed beyond jurisdiction of the court, dig. N. Y. Ct. App., 359.

When unliquidated damages can be pleaded as set off, dig. Eng. Ct. App., 318.

SHERIFF.

See Bankruptcy.

SHERIFF'S SALE.

Contradicting return of sheriff by parol evidence, dig. S. C. Ind., 179.

Personal liability of sheriff serving attachment upon the property of bankrupt, dig. U. S S. C., 279.

SLANDER.

Words spoken of a minister in his calling actionable *per se*, dig. S. C. Ga., 117.

SLANDER OF TITLE.

Liability of an owner of patent for a statement made in defense of it. Halsey v. Brotherhood, in full, Eng. Ct. App., 187.

Notice by patentee alleging infringment, dig. Eng. High Ct., Ch. Div., 197.

SPECIFIC PERFORMANCE.

An agreement for a lease which fixes no time for the the lease to begin will not be specifically enforced because of such uncertainty, dig. Eng. Ct. App., 19.

Of a contract for sale of land where time is not an element of the contract, dig. S. C. Wis., 458.

Of agreement to arbitrate price or value. Black v. Rogers, in full, S. C. Mo., 473.

Of contract by assignee, dig. S. C. Me., 417.

STATUTE OF FRAUDS.

A contract is not "in writing" unless its entire terms can be gathered from the instrument. Marion Co. v. Shipley, in full, S. C. Ind., 112.

An agreement to execute a note as surety for another, is within the statute of frauds, and to be valid must be in writing, dig. S. C. Iowa, 58.

A partially executed contract can not be revoked as to what has been done under it, though it be within the statute of frauds, dig. S. C. Mich., 58.

Implied promise to pay for land purchased at sheriff's sale, dig. S. C. Ind., 160.

Parol evidence of contract to convey lands, dig. S. C. Ind., 399.

Requisite contents of memorandum, dig. S. C. Me., 418.

The acceptance of a draft on condition that the payee should release a lien which he claims upon personal property of the drawer, is not a promise by the acceptor to pay the debt of another within the statute, dig. S. C. Ala., 97.

The transfer of the note of a third party with guaranty is a special promise to answer for the debt of another within the statute, dig. S. C. Wis., 19.

Trusts accompanied by delivery of personal property vesting in parol, dig. S. C. Mich.,

STATUTE OF LIMITATIONS.

Acknowledgment to former owner not sufficient to take the case out of the statute after the prescriptive title has become perfected, dig. Eng. Ct. App., 189.

Actions agianst executors for a legacy, dig. S. C. Pa. 178.

An offer to give a new note is an acknowledgment and new promise, dig. S. C. Pa., 353.

Applicability to trespass by subteranean encroachments, dig., S. C. Ohio, 260.

A promise by a debtor, "I will pay it as soon as possible," is sufficient to take the debt out of the statute, dig. S. C. Conn., 97.

Begins to run on a due bill payable on demand at its date, dig. S. C. Pa., 298.

Concealed fraud, dig. S. C. Me., 479.

Demands against the government, dig. U. S. S. C., 274.

Disability of coverture, dig. U. S. S. C., 358.

STATUTE OF LIMINATIONS—Continued.
The statute does not run against concealed fraud. Gibbs v. Guild, Eng. Ct. App., 490.
What amounts to break in continuous possession to stop the running of the statute, S. C. Tex. Comr. App., 159.
Will part payment of a debt on Sunday bar the statute of limitations. Q. & A., 320.
See Husband and Wife.

STATUTORY CONSTRUCTION.
Powers granted by special act of incorporation not repealed by general law, dig. S. C. Wis., 160.

STENOGRAPHY.
Evils attendant upon the use of. C. T., 81.

STOCK.
"Insurance of capital stock." Millen v. Guerrard in full, S. C. Ga., 214.
"Income" of capital stock. Biddle's Appeal, in full, S. C. Pa., 253.
"Income" of capital stock. Vinton's Appeal, in full, S. C. Pa., 273.

STOCKHOLDERS.
Liability of the shareholders of national banks for the debts of the bank, dig. S. C. Ill., 379.
Rights and liabilities of holders of unauthorized stock. Scovill v. Thayer, in full, U. S. S. C., 307.
Stockholders' liability can not be avoided by assignment, dig. S. C. Pa., 317.
Stockholder's right to assert corporate claim, dig. U. S. S. C., 416.
See Corporation.

STUDY OF LAW.
Judge Cooley's remarks on. Note 400.
"Studying law in Taney's time." Clarkson N. Potter's address to the Bar Association, 100.

SUBROGATION.
The doctrine does not apply except where the fund is hands of a common debtor, dig. S. C. Pa., 239.
To creditor's rights against a fraudulent conveyance, dig. S. C. Iowa, 37.

SUNDAY.
A contract for the transmission of a telegraphic message made on Sunday is void. Rogers v. Western Union Tel. Co., in full, S. C. Ind., 174.
Running a railroad train a work of necessity, dig. Ky. Ct. App., 498.
Sunday laws constitutional as being within the police power, dig. S. C. Cal., 297.
What is "work" on Sunday. Q. & A., 277, 319.
Will part payment of a debt on Sunday bar the statute of limitations. Q. & A., 320.

SURETY.
Effect upon surety's liability on a note of renewal induced by fraud and forgery, dig. S. C. Ind., 439.
Effect upon surety's liability on negotiable paper of the failure of the holder to enforce security, dig. S. C. Iowa, 399.
Liability not affected by immaterial alteration of contract, dig. S. C. Wis., 380.
Liability of the principal over to the surety, dig. S. C. Mich., 117.
Release of surety on a promissory note by extension of credit, dig. S. C. Me., 499.
The rule that the extent of the surety's liability is measured by that of the principal is not of universal application, and exceptions to it arise when the matter of defense pleaded by the principal is wholly of a personal character, as coverture or infancy, dig. S. C. Mo., 196.
Where a public officer, upon holding over beyond the term of his office for the want of a successor, executes a new official bond, such bond is an original undertaking, and the sureties on it are not co-securities with the sureties on his former bond, so as to entitle them to contribution in case of liability for a breach of the bond. Boone County v. Jones, in full, S. C. Iowa, 435.
See Bail-Bond, Estoppel, Guaranty, Married Woman, Negotiable Paper.

TAXATION.
A State tax on telegraphic messages to points without the State is unconstitutional and void as being a regulation of inter-State commerce; and upon government messages as a burden upon a Federal agency. Western Union Tel. Co. v. Texas, in full, U. S. S. C., 448.

TAXATION—Continued.
Power of collector in sale of land for taxes, dig. Md. Ct. App., 499.
Of the assets of National banks in hands of receivers, dig. U. S. S. C., 197.
Of the debt of another State unconstitutional, dig. U. S. S. C., 197.
Surplus of proceeds of tax sale after payment of taxes, dig. U. S. S. C., 579.
Taxation by the United States of the capital of National banks when invested in foreign securities, dig. U. S. S. C., 159.
Taxation of stock of foreign corporations, dig. S. C. Ind., 220.

TELEGRAPH.
A contract for the transmission of a telegraphic message made on Sunday is void. Rogers v. Western Union Tel. Co., in full, S. C. Ind., 174.
A State tax on telegraphic messages without the State is unconstitutional and void as being a regulation of inter-State commerce; and upon government messages as being burden on a Federal agency. Western Union Tel. Co. v. Texas, in full, U. S. S. C., 448.
Liability of company for change in unrepeated message. Western Union Tel. Co. v. Blanchard, in full, S. C. Ga., 331.
Repetition of telegraphic messages. C. T., 481.
"Repetition of telegraphic messages." A. G. McKean, 386.
"Telegrams as evidence." Jas. A. Seddon, 262.
The regulation of a telegraphic company requiring a message to be "repeated" to render the company liable for a mistake is unreasonable, dig. S. C. Ga., 219.

TENANCY IN COMMON.
Tenancy in common by husband and wife, dig. Md. Ct. App., 298.
See Partition.

TRADE-MARK.
The trade-name of a firm is property and is subject to assignment, dig. S. C. N. Y., 117.

TRESPASS.
Administrator's right of action for trespass upon leasehold property, dig. S. C. Ind., 220.
Subtereanean encroachments, dig. S. C. Ohio, 260.

TRUST.
Cost in the administration of a trust fund. C. T., 441.
Costs of the administration of a trust fund. Trustees, etc. v. Greenough, in full, U. S. S. C., 469.
Deed by trustee, how signed, dig. S. C. Ga., 195.
Deposit in savings bank under certain circumstances amounting to a declaration of trust, dig. N. Y. Sup. Ct., 97.
Duties and liabilities of trustees under specific trust, dig. S. C. Mich., 380.
Identity of trust fund, dig. S. C. Me., 479.
"Income" of capital stock, as between life-tenant and remainderman. Vinton's Appeal, in full, S. C. Pa., 273.
Irrevocability of trust in behalf of next of kin, dig. Eng. High Ct., Ch. Div., 197.
No resulting trust will arise on behalf of the children of a grantor in a fraudulent conveyance. Rastham v. Roundtree, in full. S. C. Tex., 190.
Where funds held in a fiduciary capacity are deposited in bank, what will amount to notice of the trust, dig. S. C. Ind., 177.
Where a person deposits money in his own name, as trustee, in a savings bank in trust for another, the title remains in the depositor and does not pass to the beneficiary. Smith v. Speer, N. J. Ct. Errors and Appeals, in full, note, 16.
See Jurisdiction.

ULTRA VIRES.
See Corporations.

UNITED STATES.
Acceptance by claimant without protest of adjustment of government claim, dig. U. S. S. C., 438.

USURY.
A payment upon contingency is not usurious, dig. S. C. Pa., 239.
Circumstances to condone, dig. S. C. Pa., 299.
Effect of usurious deed, dig, S. C. Ga., 359.
Payment of usurious interest a payment *pro tanto* upon principal, dig. S. C. Neb., 337.
What contract by a National bank is usurious, dig. U. S. S. C., 279.

VENDOR'S LIEN,
Taking collateral security a waiver of lien, dig. S. C. Mo., 399.

WAREHOUSE RECEIPTS.
See Evidence.

WAR CLAIMS.
Are war claims negotiable? Q. & A., 418.

WARRANTY.
See Deed.

WASTE.
Committed beyond the jurisdiction of the court as set-off, dig. N. Y. Ct. App., 359.

WILL.
Burden of proof of undue influence of chief beneficiary, dig. S. C. Pa., 260.
Construction of devise. Q. & A., 276.
Construction of devise where the question is estate tail or fee simple, dig. S. C. Ga., 359.
Construction of a bequest of a share of partnership business in view of a subsequent acquisition of the whole, dig. Eng. High Ct., Ch. Div., 359.
Construction of life estate, dig. Ky. Ct. App., 260.
Defective exercise of power of appointment, dig. S. C. Pa., 418.
Disposition of testator's body by will. C. T., 321.
"Does construction construe." A. J. Hirschl, 305.
Evidence of undue influence in issue of *devisavit vel non*, dig. S. C. Pa., 380.
"Income" of capital stock bequeathed for life. Biddle's Appeal, in full, S. C. Pa., 253.

WILL—Continued.
Lapse of a remainder devised over after a life estate, dig. S. C. N. Y., 118.
Life estate, upon condition, with the *jus disponendi* of a life interest only. Giles v. Little, in full, U. S. S. C., 151.
Mistake in the insertion of a word without knowledge of testator, dig. Eng. High Ct., Prob. Div. & Adm. Div., 499.
Personal liability of devisee with instructions to pay legacy, dig. S. C. Pa., 179.
Subsequent marriage not absolute revocation, dig. S. C. Pa., 337.
Where a legacy is given by will, settled on a daughter vesting at twenty-one or on marriage with consent of her "guardian or guardians," and the infant marries under age, such consent is a condition precedent which must be strictly complied with, and if there is no guardian the infant must procure one to be appointed. Otherwise, if the infant dies under age, the legacy does not vest, dig. Eng. Ct. App., 97.
Where capital stock is bequeathed for life, what is the "income" of stock. Millen v. Guerrard, in full, S. C. Ga., 214.
"Will or no will." *Journal of Jurisprudence*, 245.
See Jurisdiction.

WORDS AND PHRASES.
"Custodia legis," dig. S. C. Iowa, 97.

WRIT OF ERROR.
In divorce case after death of party to settle property rights, dig. S. C. Col., 337.
See Appeals.

WRIT OF ERROR CORAM NOBIS.
See Judgment.

312.